FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

JUN 15 2010

Stephan Harris, Clerk
Casper

# United States District Court
## For The District of Wyoming

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| STEVEN R. ERVIN, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Case No. 09-CV-44-D |
| JUSTIN SNELL, | ) | |
| Defendant. | ) | |

**ORDER ON MOTION TO DISMISS**

This matter is before the Court on Defendant's Motions to Dismiss (Doc. #s 5,14, 19, and 24). For reasons discussed below, Docket Nos. 5, 14, and 19 are hereby terminated as moot. The Court heard argument on defendant Justin Snell's remaining Motion to Dismiss (Doc. # 24) on May 12, 2010. Being fully advised on the premises of this motion, the Court now FINDS:

### I. Procedural Background

Plaintiff Steven R. Ervin ("Ervin"), acting *pro se*, originally filed his Complaint against various defendants alleging that while incarcerated, he was subjected to conduct that violated the Eighth Amendment and 42 U.S.C. § 1983. Ervin's Complaint sought declaratory and injunctive relief as well compensatory and punitive damages in the amount of one million and five hundred thousand dollars. The defendants filed a combined motion

to dismiss contending Ervin failed to state a claim for which relief may be granted, asserting qualified immunity, and invoking the Eleventh Amendment Immunity. The defendants also argued ineffective service of process. Subsequent to defendants' filing of their motion to dismiss, Ervin's Motion to Proceed *in forma pauperis* was granted and a waiver of service was executed by defendants Justin Snell, Michael Murphy, and Robert Lampert. The defendants then renewed their motion to dismiss (Doc. # 14), making the same arguments as were asserted in the original motion minus the ineffective service of process argument. Ervin then sought and was granted leave of Court to amend his original Complaint. Just as they had done with the original Complaint, the defendants once again moved to dismiss the newly Amended Complaint (Doc. # 19), again arguing Ervin had failed to state a claim for which relief may be granted, asserting qualified immunity for Justin Snell ("Snell"), and invoking the State's Eleventh Amendment Immunity. Ervin then sought, and was granted, leave of Court to file a Second Amended Complaint, along with a Motion to Dismiss defendants Michael Murphy and Robert Lampert. Both motions were granted. On December 17, 2009, Snell, the only remaining defendant, filed a Motion to Dismiss the Second Amended Complaint (Doc. # 24).

Ervin originally responded to Snell's Motion to Dismiss on December 17, 2009. However, on January 8, 2010, Jennifer Horvath and Steven Pevar, both of the ACLU, entered appearances on behalf of Ervin. On January 26, 2010, Ervin filed an unopposed Motion to Supplement his response to accommodate for his recent acquisition of counsel.

The Court granted the motion and granted permission to Snell to reply.

## II. Factual Background

Ervin alleges that in early March of 2008, Snell, who works as a Correctional Officer at the Wyoming State Penitentiary ("WSP"), approached him in his cell and ordered him to move his belongings to one side of the cell because Snell was moving another inmate into the cell. Ervin informed Snell that the same inmate Snell sought to move into his cell had recently moved out to be housed with an inmate closer to his age and who listened to the same type of music. Ervin informed Snell further, that a move request had already been submitted to the housing manager to move a preferred inmate into his cell. Later that day in the Chow Hall, Snell told Ervin that his belongings needed to be moved to one side of the cell because Snell ran the prison and because he did not care about previous moving arrangements. While Ervin was talking with his caseworker, Snell made accusations that Ervin was a snitch to three other inmates. In particular, Ervin alleges that while talking with his caseworker, Snell told other inmates that Ervin "was in the back room with them white folks snitching on us, and telling them peckerwoods that the Plaintiff did not want to be housed up with inmate Patterson for alleged conflicts with inmate Patterson and preferred to cell up with a white boy." Pls.' Second Amended Compl. ("Pls.' Compl.") 2.

Ervin was then confronted by the three inmates about what Snell told them. According to Ervin, the other inmates were very aggressive toward him. When Ervin asked

the other inmates "who put a snitch jacket one me," they responded that it was Snell who had called him a snitch. Ervin then approached Snell and inquired why he labeled him a "snitch?" Snell allegedly responded: "Don't try to lie out of it Ervin, you know you were back there running your mouth off." Pls. Compl. 3. Ervin then turned around to face the three inmates that had confronted him, and followed them into an adjacent computer room.

Once in the computer room, Ervin attempted to diffuse the situation between he and the other inmates, but one inmate would not be appeased. In a last attempt to diffuse the situation, Ervin said to one of the calmer inmates: "What you going to try and beat me up now, I can take an (explicative) [sic] whipping, and I can give one too?" *Id.* at 4. Plaintiff alleges that while the situation escalated, Snell sneered and laughed at him. The only thing that saved Plaintiff from the eventual confrontation, was being locked down for count, but with the delay came the promise from one of the inmates that they "would handle this (explicative) [sic] when we come out for count." *Id.*

Ervin then returned to his cell for count. Snell entered Ervin's cell and asked him whether he had any conflicts with any inmates in the pod he was housed. To which Ervin responded that he did not, nor has he ever had a conflict with anyone. *Id.* According to Ervin, Snell then said: "You know you were back there talking to them caseworkers about what's going on in this pod Ervin." *Id.* Ervin then asked Snell to leave because it did not look good having him in his cell talking to him. Snell left, went to another inmates cell briefly and then returned. Upon returning to Ervin's cell, Snell ordered him to collect his

belongings because he was being moved. Ervin repeated that he did not have any conflicts with other inmates and questioned Snell about why he was being moved. Snell responded: “Well you must have some kind of conflict if you were back there running your mouth, roll your (explicative) [sic] up Ervin, I ain’t got time to play with you.” *Id.* at 5. Ervin collected his belongings and was escorted by Snell to another unit. Three days later, Ervin learned that he was in administrative segregation because Snell labeled him a “Snitch.” *Id.* This story was confirmed by another Correctional Officer. While in administrative segregation, Ervin was not permitted visits with his wife, mother, or pastor. Additionally, during his segregation, his phone privileges were restricted, and he was not permitted to attend chapel services, attend meals or recreate, or attend school with other inmates. At some point, Ervin was informed that these restrictions would be permanent for the duration of his sentence unless he signed forms certifying that his life was not in danger and that no conflicts existed between he and other inmates.

Sometime between March 3, 2008 and March 10, 2008, Snell went to the Rifleman bar in Rawlins, Wyoming, where Ervin’s wife is an employee. According to Ervin, Snell informed his wife that he had Ervin moved to protective custody because other inmates were going to kill him for being a “snitch.” *Id.* Overtime, Snell began frequenting the Rifleman Bar, all the while making similar comments about Ervin being labeled as a snitch to his wife.

On March 10, 2008, Ervin filed a grievance against Snell. Ervin and his wife were

interviewed by an internal affairs officer of the WSP regarding the grievance on April 22, 2008. The same day, the WSP grievance manager acknowledged that Snell may have conducted himself in an inappropriate manner.

On May 1, 2008, Ervin was moved from administrative segregation to another prison housing unit. According to Ervin, upon his arrival in the new unit, Snell began to harass, antagonize, and humiliate him during chapel services, meals, medical appointments, and during visitations with his wife. *Id.* at 6. Ervin began filing grievances and appeals, as well as corresponding with ACLU attorney, Stevan Pevar, and Etoshi Bakari, an attorney with the Department of Justice's Civil Rights Division. On May 5, 2008, Pevar made a visit to Ervin in regards to his complaints against Snell. After Pevar departed, Ervin was approached by WSP personnel who informed him that Mr. Pevar was highly disliked by prison administration and that his association with Mr. Pevar would "red-tag" him for the remainder of sentence. According to Ervin, he was also informed that he would have "to watch his back."

In June of 2008, Ervin began receiving responses to his grievance appeals. With respect to his appeal of grievance ## 262 and 317, the responses stated that appropriate corrective action had been initiated at the institutional level, and that Snell's inappropriate behavior would not be an issue in the future. Accordingly, Ervin's grievance appeal was denied in part because the relief Ervin requested was outside of the grievance policy's parameters.

At 7:00 on September 5, 2008, Snell was working the unit to which Ervin was assigned. Snell stared at Ervin in his cell and opened his cell door laughing at him. Ervin then called his wife and requested that she inform the ACLU that Snell was intimidating him, and that he did not trust Snell.[1] Snell overheard Ervin mention Mr. Pevar while he was on the phone with his wife. Snell approached Ervin and Ervin asked Snell whether there was anything he could help him with. He also informed Snell that he was talking on the phone to his wife, to which Snell responded: "Oh, don't you mess with me today Ervin or I'll make it very hard for you today." *Id.* at 7. According to Ervin, his wife overheard Snell's remark and asked whether Plaintiff had just been threatened. Ervin replied yes and expressed his comfort that prison calls were recorded and as such, maybe he could prove that Snell had been antagonizing him since filing a grievance against him.

Shortly after this altercation with Snell, Ervin was called to the WSP Medical Unit for transport to the dentist. He reported the altercation with Snell to the WSP transport officer. The transport officer assured Ervin that he would notify his superior about the altercation and also stated that he had witnessed Snell verbally assault another inmate immediately after Ervin's interaction with Snell. After Ervin's dental appointment he reported the recent threats made by Snell.

After reporting the incident to his caseworker, Ervin was approached by Snell, who

[1] At some point, Plaintiff contends that other Correctional Officers warned him to be leery of Snell because there numerous grievances to WSP administrative officials had been filed by co-workers and inmates against Snell. *See* Pls.' Compl. 7.

informed him that he had a visitor and that Snell was going to escort him to the visitation unit personally. Snell escorted Ervin to the visitation unit, and upon arrival commenced a complete strip search of Ervin. As it turns out, Ervin's visitor was his wife, who commented after Snell left that he was a frequent visitor to her work and that while she was waiting to see Ervin, Snell had commented: "Oh, I'll be escorting your ole man up here for his visit." *Id.* at 8.

The next day, Ervin called the WSP "Hot-line" to report Snell's threats and his interactions with Ervin's wife at the Rifleman Bar. At 10:00, Ervin was once again placed in administrative segregation, allegedly to protect him from Snell. Several days later, Snell pounded on Ervin's cell door, and stated: "Hey Ervin, I brought you your commissary." *Id.* This caused Ervin to fear for his life.

At about the same time, Mr. Pevar contacted the Wyoming Attorney General in regards to Snell's treatment of Ervin, and the confiscation of Ervin's legal documents and electronic records related to Snell. Mr. Pevar requested that the allegations against Snell be investigated. Mr. Pevar also requested the Wyoming Attorney General interview Ervin and his wife, and asked that Michael Murphy, the Warden, instruct Snell to limit his contact with Ervin. According to Ervin, the Wyoming Attorney General's Office initiated an investigation into the matter based on Mr. Pevar's reports.

In late September, 2008, Ervin contacted the Wyoming Board of Parole to explain why he was administratively segregated, and that due to his segregation from the general

population of the prison, he would be required to appear in front of the parole board in chains and shackles. Ervin was embarrassed and humiliated. A few days later, Ervin was contacted by Warden Murphy. Murphy explained to him that in order to keep him safe, his ability to attend chapel, choir, and to do other activities would be severely limited. Warden Murphy encouraged Ervin to remain patient and to continue to make positive changes.

Upon completion of the Wyoming Attorney General's investigation of Snell, Ervin was released back into the general prison population. While in general population, Snell made several visits to Ervin's housing unit. Snell was also the officer who inventoried Ervin's belongings when he was finally granted parole on December 10, 2008. Snell also inventoried Ervin's belongings on one prior occasion.

Two days after being released, Ervin and his wife sought and were granted a protective order against Snell by the Carbon County Sheriff's Office. After being served with the protection order, Snell went to the Rifleman Bar and was obnoxious and rude to Ervin's wife. A few weeks later, Snell twice went to Ervin's place of employment, Cactus Jack's restaurant. While at Cactus Jack's, Snell sneered at Ervin.

## III. Discussion

### A. Standard of Review

"The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz,* 948

F.2d 1562, 1565 (10th Cir.1991). To survive a motion to dismiss, the allegations contained in the complaint "must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief ." *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir.2008) (footnote omitted). "In addition to the Complaint, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the document's authenticity." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) (citing *GFF Corp. V. Assoc. Wholesale Gorcers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997)).

**B. Eighth Amendment Claim**

Ervin contends that Snell violated his Eighth Amendment right to be free from cruel and unusual punishment. "[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment[.]" *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). "Prison officials have a duty to protect prisoners from violence at the hands of other prisoners." *Benefield v. McDowell*, 241 F.3d 1267, 1270 (10th Cir. 2001) (citing *Farmer*, 511 U.S. at 833 (alterations omitted). "A prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Id.* at 1270-71. "[T]he Eighth Amendment deliberate indifference standard has a subjective component" and an objective component. *Id.* at 1271. "A prison official who knows of and disregards an excessive risk to inmate health or safety is deliberately indifferent for these purposes." *Id.* Thus, "in order to establish a cognizable

Eighth Amendment claim for failure to protect, a plaintiff must show that he is incarcerated under conditions posing a substantial risk of serious harm, the objective component, and that the prison official was deliberately indifferent to his safety, the subjective component." *Id.* (quotation omitted). In the Tenth Circuit, "labeling an inmate a snitch . . . constitutes deliberate indifference to the safety of that inmate." *Id.* (citing *Northington v. Marin*, 102 F.3d 1564, 1567 (10th Cir. 1996)).

Snell argues that Ervin's Second Amended Complaint does not allege a cause of action under *Benefield*. In particular, Snell argues that Ervin's allegations are contradictory and that at best, the allegations indicate that the snitch label came from Ervin and other inmates, but not from Snell. Furthermore, Snell points out that Ervin himself acknowledges that he was never attacked because he was immediately placed in protective custody. In essence, Snell argues that because he did not label Ervin as a snitch, and because Ervin was immediately placed in administrative segregation, he cannot be said to have disregarded Ervin's safety.

Ervin rebuts Snell's contentions and argues that Snell did inform other prisoners that he was a snitch, that the other inmates confronted him, and that he remains frightened to this day. Under these facts, Ervin contends dismissal of his complaint is unwarranted because his allegations against Snell are facially concrete and plausible. The Court Agrees.

Snell makes much of his decision to remove Ervin from the general prison

population. He contends that even had he labeled Ervin a snitch, by placing him in administrative segregation, he demonstrated concern for his safety. Snell relies on *Curley v. Perry*, 246 F.3d 1278, 1282 (10th Cir. ) ("By placing [an inmate] in administrative segregation, the officials have demonstrated concern for his safety."), and *DeSpain v. Uphoff*, 264 F.3d 965, 975 (10th Cir. 2001) ("If an official is aware of the potential for harm but takes reasonable efforts to avoid or alleviate that harm, he bears no liability under this standard."), for the proposition that an official demonstrates concern for an inmates safety by placing him in administrative segregation and that no liability can arise where the official takes reasonable efforts to avoid or alleviate harm. *See* Snell's Mem. In Support of Mot. To Dismiss 12 (Doc. 24). However removing Ervin from the general population demonstrated Snell's concern for his safety, administrative segregation did nothing to reduce the initial threats by other inmates or to assuage Ervin's psychological fears. *See Benefield*, 241 F.3d at 1272 (stating that "Eighth Amendment may be implicated not only to physical injury, but also the infliction of psychological harm. The actual extent of any physical injury, threats or psychological injury is pertinent in proving a substantial risk of serious harm.").

Ervin's complaint asserts that upon being labeled a "snitch" by Snell, he was confronted by other inmates one who even went so far as to say "[let's handle this fool, . . . I'm ready to get down right now, I'm not scared of these punk . . . cops, let's do this." Pls' Compl. 3. Ervin also asserts that he was and remains afraid to this day. Thus, Snell's

decision to segregate Ervin from the general prison population after he was already confronted and threatened by other inmates about the being a "snitch" was too little and too late to remove liability for the snitch label he is alleged to have given Ervin. *See Purkey v. Green*, 28 Fed.Appx. 736, 745 (10th Cir. 2001) ("While an idle threat of impending physical harm that is not carried out will not suffice to state an Eighth Amendment claim, an imminent threat of serious harm, even though no injury never occurs, will suffice.") (quotation omitted). This is particularly true given the allegations, that the only thing that precluded the other inmates from actually attacking Ervin, was the initiation of count. Moreover, Ervin alleges that Snell "seemed to be enjoying the situation by sneering and laughing at the Plaintiff." Pls.' Compl. 4. Accordingly, the Court finds that Ervin asserts a plausible claim for relief based on these facts as alleged in his Second Amended Complaint. Moreover, construing Ervin's *pro se* pleadings liberally, *see Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 420-21 (1972), the Court finds Ervin's allegations sufficient to survive Snell's Motion to Dismiss.[2]

**C. Retaliation**

Ervin also alleges that Snell retaliated against him for filing grievances against him. "Prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his constitutional rights. However, an inmate claiming retaliation must allege

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[2] Snell invites the Court to consider the content of Ervin's grievances as proof of a contradictory story that precludes a claim for relief. Having reviewed the grievances, the Court finds them insufficient on their own to support Snell's Motion to Dismiss.

specific facts showing retaliation because of the exercise of the prisoner's constitutional rights." *Fogle v. Pierson*, 435 F.3d 1252, 1263-64 (10th Cir. 2006) (citing *Peterson v. Shanks*, 149 F.3d 1140, 1149 (10th Cir. 1998)) (quotations and alterations omitted).

Ervin alleges that in response to his filing of grievances, Snell harassed both he and his wife. First, Ervin alleges that he was threatened by Snell while talking on the phone. Next, Ervin alleges that Snell stared at him and laughed at him. He further alleges that after he reported Snell's actions against him and his wife, that he was placed in administrative segregation again to protect him from Snell. Even after being segregated from Snell, however, Ervin alleges that Snell pounded on his cell door while delivering his commissary and that this caused Ervin to fear for his life. The Court finds that the facts Ervin has alleged put forth a plausible claim for relief. Accordingly, Snell's Motion to Dismiss the retaliation claim is denied.

**D. Qualified Immunity**

Snell asserts that he has qualified immunity and as such, Ervin's Second Amended Complaint should be dismissed. "Qualified immunity protects a government official from personal liability and the burden of having to go to trial unless he violated 'Clearly established statutory or constitutional rights of which a reasonable person would have known'" *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1184 (10th Cir. 2010) (quoting *Anderson v. McCotter*, 100 F.3d 723, 729 (10th Cir. 1996)); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To defeat Snell's assertions of qualified immunity,

Ervin must allege that Snell's "actions violated a constitutional or statutory right and that the rights [Snell] violated were clearly established at the time of the conduct at issue." *Id.* (quotation omitted). "To meet this burden, [Ervin] must do more than simply allege the violation of a general legal precept; rather, [he is] required to demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Id.* (citing *Jantz v. Muci,* 976 F.2d 623, 627 (10th Cir.1992) (quotation omitted)).

"For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (citing *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (quotation and alteration omitted). "[T]his standard does not require a precise factual analogy to pre-existing law; however, the plaintiff must demonstrate that the unlawfulness of the conduct was apparent in light of pre-existing law." *Id.* "This preexisting law must consist of either a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts." *Id.* (quotation omitted).

In this case, there is clear Tenth Circuit precedent on point. As noted above, the Tenth Circuit in *Benefield*, stated that "labeling an inmate a snitch . . . constitutes deliberate indifference to the safety of that inmate." 241 F.3d at 1271. The Tenth Circuit decided *Benefield* in 2001, long before Snell's actions are alleged to have taken place. Likewise, in 1998 the Tenth Circuit held that "[p]rison officials may not retaliate against or harass an

inmate because of the inmate's exercise of his constitutional rights." *See, e.g., Peterson*, 149 F.3d at 1149. Because these rights were clearly established at the time of the Snell's alleged conduct in March of 2008, Snell is not entitled to qualified immunity at this point in the case.

**IV. Conclusion**

For the foregoing reasons, Defendant Snell's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

DATED this 15th day of June, 2010.

Chief United States District Judge