IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSHUA D. ZOLLICOFFER a/k/a PASSION STAR, Plaintiff,	§	
versus	§	Case No. 4:14-cv-03037
BRAD LIVINGSTON, personally and in his official capacity as Executive Director of the Texas Department of Criminal Justice ("TDCJ"); RALPH BALES, personally and in his official capacity as PREA Ombudsman; JONI WHITE, personally and in her official capacity as Assistant Director of TDCJ's Classification and Records Department; BRUCE ARMSTRONG, personally and in his official capacity as Assistant Regional Director in the State Classification Committee; FERNANDO FUSTER, personally and in his official capacity as Assistant Regional Director in the State Classification Committee; KENNETH DEAN, in his personal capacity; BRIAN BLANCHARD, in his personal capacity; RENE MALDONADO, in his personal capacity; RALPH MAREZ, JR., in his personal capacity; SIGMUND L. SMITH, in his personal capacity; PRINCE PICKETT, in his personal capacity; LESLIE WALTERS, in her personal capacity; RONALD FOX, personally and in his official capacity as Senior Warden at the Robertson Unit; ADAM GONZALES, personally and in his official capacity as Assistant Warden at the Robertson Unit; JIMMY S. WEBB, personally and in his official capacity as Assistant Warden at the Robertson Unit; and JUAN LOPEZ, personally and in his official capacity as Sergeant at the Robertson Unit, Defendants.	§	*Jury Trial Demanded*

DEFENDANT LIVINGSTON'S MOTION TO DISMISS UNDER 12(b)(1) and (6) FOR LACK OF JURISDICTION FOR FAILURE TO STATE A CLAIM AND ASSERTION OF QUALIFIED IMMUNITY

Comes now Defendant Brad Livingston, Defendant in the above styled and numbered cause, represented by and through the Attorney General of Texas, and files this his Motion to Dismiss Under 12(b)(1) and (6) for Lack of Jurisdiction for Failure to State a Claim, and assertion of qualified immunity.

I.

FACTS

Plaintiff is an inmate in the TDCJ Clements unit in Amarillo. He alleges that during his incarceration within TDCJ, he has been the victim of sexual assaults and abuse by other inmates. He alleges that defendants have failed to protect him from the assaults. He also alleges that the state and unit classification committees and their members failed to properly house him. Defendant Brad Livingston is sued in his official and personal capacities as Executive Director of TDCJ. Plaintiff alleges that Livingston "is the commanding officer of all TDCJ correctional officers…and is responsible for their training, supervision and conduct. He has ultimate responsibility...for overseeing the day to day operation of state prison facilities…". [D.E. 1, ¶10].

Plaintiff sued Defendant Livingston in his personal capacity under 42 U.S.C. §1983, but did not allege any personal involvement by Livingston in the alleged constitutional violations. As a result claims against Livingston in his personal capacity for compensatory and punitive damages should be dismissed for lack of jurisdiction, as plaintiff has failed to state a claim against Defendant Livingston. Plaintiff has also alleged facts to overcome Livingston's defense of qualified immunity.

II.

PERSONAL CAPACITY CLAIMS FOR FAILURE TO SUPERVISE AND TRAIN

A. Plaintiff's claims for failure to supervise and train and claims for respondeat superior or supervisory liability.

Plaintiff's claims against Livingston are claims for failure to train and supervise, which are respondeat superior claims. It is well established that §1983 does not create respondeat superior liability. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Public officials cannot be held liable for the violations of their subordinates. The Supreme Court has warned that that allowing such claims to proceed against the head of a state agency would impose a "counterproductive" burden on that official and would create a "substantial diversion" from their everyday duties to formulate "sound and responsible policies." *Id*. at 1953. Add to that the burden of discovery, which imposes "heavy costs in terms of efficiency" and expends "valuable time and resources," *see id.*, and efficient public administration is greatly diminished. Such concerns for effective government have led the Supreme Court to eliminate liability for failure to supervise and train. *Id.* at 1948-49. Because these are the theories, the only theories, of liability which form the basis of plaintiff's complaint against Brad Livingston, plaintiff's claims should be dismissed as a matter of law. Plaintiff has sued defendant Livingston in his personal capacity for violations of 42 U.S.C. §1983, and makes the following claims:

1. Defendant Livingston failed to protect [plaintiff] from substantial risk of serious harm in violation of her rights. [D.E.35 at ¶189]
2. Defendant Livingston had personal knowledge of the threats to plaintiff and the substantial risk of serious harm to her. [D.E.35 at ¶190]

3. Defendant Livingston failed to take reasonable safeguards to protect plaintiff despite knowledge of a substantial risk to her safety. [D.E.35 at ¶191]
4. The actions and omissions of Defendant Livingston are so grave they violate contemporary standards of decency. [D.E.35 at ¶192]
5. Defendant Livingston failed to train, supervise, and enforce TDCJ employees adequately regarding TDCJ policies and, specifically, measures to protect gay and transgender inmates from the substantial risk of serious harm. [D.E.35 at ¶193]
6. Defendant Livingston failed to train and supervise his subordinates adequately to enforce TDCJ policies. [D.E.35 at ¶194]
7. Contrary to written policy, Defendant Livingston has condoned, ratified, and/or adopted a wide spread and pervasive custom and practice that deters inmates from filing complaints. [D.E.35 at ¶195]
8. Defendant Livingston disregarded a known or obvious consequence of the wide spread and pervasive custom and practice he has condoned, ratified or adopted. [D.E.35 at ¶196]
9. Defendant Livingston was aware that violence in prison was frequent and regular and that predatory gangs operated across TDCJ facilities and targeted vulnerable people in custody. [D.E.35 at ¶197]
10. Defendant Livingston was aware that gay people are vulnerable, and the risk to plaintiff was obvious. [D.E.35 at ¶198]

B. Plaintiff Has Failed To Allege Facts Which Meet Iqbal's Strict Pleading Standard For Alleging A Constitutional Violation By A Supervisory Government Official

Supervisory officials are not subject to vicarious liability under 42 U.S.C. §1983. Executive defendants may be liable under 42 U.S.C. §1983 only if (1) they affirmatively participate in the acts that cause the constitutional deprivation, or (2) they implement unconstitutional policies that causally result in the constitutional injury. Plaintiff's complaint does not claim that Livingston participated or had personal involvement in the acts that allegedly caused any deprivation of Plaintiff's constitutional rights. Nor does it claim that Livingston was aware of any housing complaints of Plaintiff. Nor does the Complaint demonstrate that Livingston implemented any clearly established unconstitutional policies that causally resulted in Plaintiff's injuries. It is instead, premised on the rank of his position and seeks to impose liability on a respondeat superior theory, falling short of meeting the burden of providing as a basis for a right to relief "more than labels and conclusions."

The Supreme Court has required that supervisory officials be shown to have personal involvement before qualified immunity may be held defeated. *Iqbal* involved a lawsuit by a man who alleged that, while he was in federal custody, his jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell, pursuant to a policy of discrimination on the basis of race, religion, and national origin. The plaintiff alleged that former Attorney General Ashcroft was the "principal architect" of the policy and that he knew, or should have known, that constitutional violations were occurring and failed to correct them. The Court held that the claim of "knowledge and acquiescence" by a supervisor is insufficient to impose liability. The Supreme Court acknowledged that Iqbal might have a valid claim for damages against the particular jailors

who attacked him, but held that his complaint did not state a claim against Ashcroft, or former FBI Director Robert Mueller, both of whom were entitled to qualified immunity.

Before *Iqbal*, all courts of appeals, including the Fifth Circuit, recognized some form of supervisory liability under 42 U.S.C. §1983. In the Fifth Circuit, as in all courts of appeals, supervisory liability could still attach for failure to train, failure to supervise, or knowledge that subordinates are committing civil rights violations, and ignoring or acquiescing in them. The *Iqbal* Court rejected supervisory liability as "a misnomer" and instructed that a government official "is only liable for his or her own misconduct." Policy and supervision are "the exact types of supervisory liability that *Iqbal* eliminated. "[U]nder *Iqbal*, ... [a] defendant is not liable ... if the defendant's failure to act deprived the plaintiff of his or her constitutional right...Plaintiff's claim, based on [defendant's] 'failure to take corrective measures,' is precisely the type of claim *Iqbal* eliminated." *Iqubal* rejected the claim that supervisors can be liable for "knowledge and acquiescence" in their subordinates' violations of the constitution. *Id* at 676.

Here, the complaint must be dismissed because plaintiff's allegations do not satisfy the standards set forth in *Iqbal*. The complaint fails to plead any specific facts plausibly establishing that Livingston, through his individual actions, participated in the failure to protect alleged by plaintiff. Instead, plaintiff pleads that Livingston failed to train and supervise TDCJ employees and failed to enforce TDCJ policies meant to protect gay and transgender inmates. [D.E. 35 at ¶145-162]. These bare allegations amount to an attempt to hold an agency director liable for alleged constitutional violations of his subordinates. *Iqbal* makes clear that such a broad claim of supervisory liability lacks merit.

C. Plaintiff Has Failed To Allege Facts To Overcome Qualified Immunity

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity is both a defense to liability and a limited "entitlement not to stand trial or face the other burdens of litigation." *Iqbal*, at 671.

Plaintiff has the burden to state facts demonstrating that no similarly situated official could have reasonably considered the conduct of the official to be lawful under the circumstances known to him at the time. "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." Although qualified immunity is an affirmative defense, "plaintiff has the burden to negate the assertion of qualified immunity once properly raised." *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir.2009).

In *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir.1985), the Fifth Circuit held that when a defendant-official in his individual capacity raises a qualified immunity defense, a heightened pleading standard must be met by Plaintiff to show with factual detail and particularity why the defendant official cannot maintain the qualified immunity defense. See also *Schultea v. Wood*, 47 F.3d 1427, 1429–34 (5th Cir.1995) (en banc) (discussing development of qualified immunity defense and pleading rules) ("When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or its own, require the plaintiff to reply to that defense in detail. By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations. A defendant has an incentive to plead his defense with some particularity because it has the practical effect of requiring particularity in the reply."); *Floyd v. City of Kenner, La.*, 351 Fed. App'x 890, 893 & n. 2 (5th Cir.2009).

Here, the plaintiff has pled nothing more than that Livingston failed to properly train and supervise, and that as Executive Director of TDCJ, he knew or should have known of risks to gay and transgender inmates. This negligence pleading is simply not enough under the heightened pleadings requirements of *Iqbal*. As a result, plaintiff's claims against Livingston in his individual capacity should be dismissed as a matter of law.

III.

PLAINTIFF'S CLAIMS FOR INJUNCTIVE RELIEF

A. Plaintiff's Claims For Prospective Injunctive Relief Are Moot

Plaintiff has also sued Livingston in his official capacity for injunctive relief, specifically to be housed in safekeeping for the remainder of his incarceration period. Plaintiff alleges that he was improperly housed while at the Robertson unit in Abilene and the Hughes unit in Gatesville. Plaintiff has since been moved to the Bill Clements unit in Amarillo. Therefore, plaintiff's claims for injunctive relief in the future are moot. [D.E.1 at ¶175-170 [sic]].

The Supreme Court articulated the constitutional "preconditions for asserting an injunctive claim in a federal forum" in *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, (1983), holding that to "satisfy the threshold requirement imposed by Art. III of the Constitution," a plaintiff seeking injunctive relief must "show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged ... conduct." The Court also clarified that "[p]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *Brown v. Edwards*, 721 F.2d 1442, 1446 (5th Cir.1984). The Fifth Circuit has held that "[t]o pursue an injunction or a declaratory judgment, the [plaintiffs] must allege a likelihood of future violations of their rights by [defendants], not simply future effects from past violations. *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *Armstrong v. Turner*

Industries, Inc., 141 F.3d 554, 563 (5th Cir. 1998). As stated in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), the federal "judicial power exists only to redress or otherwise to protect against injury to the complaining party." The Fifth Circuit recently reemphasized the "case or controversy" requirement that is at the root of the standing doctrine in *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 312 (5th Cir.1997), where it stated that to maintain suit, including one for declaratory or injunctive relief, a plaintiff "must show that an actual case or controversy under the [ADA] exists." Additionally, "the injury or threat of injury must be both real and immediate, not [merely] conjectural or hypothetical." Id.

Here, plaintiff no longer lives at the Hughes or Robertson units. While he may be transferred to any unit in the TDCJ system, there is presently no reasonable likelihood that the plaintiff will again be subjected to the allegedly unconstitutional actions at Hughes or Robertson. Therefore, all claims by plaintiff for injunctive relief from conditions allegedly taking place at Hughes or Robertson should be dismissed as a matter of law.

B. Plaintiff's Claims For Retrospective Injunctive or Declaratory Relief Are Improper

A state official in his official capacity is not a proper party in a claim for retrospective injunctive and declaratory relief. *Green v. Mansour*, 474 U.S. 1111 (1985). In plaintiff's prayer for relief, he prays for "[a] declaratory judgment that the practices, acts, and omissions complained of herein violated plaintiff's constitutional rights (in the past) [D.E. 35 at ¶IV.3], and for expungement of any disciplinary violations on Plaintiff's record connected to Defendants' failure to protect Plaintiff [D.E. 35 at ¶IV.4]. These are requests for injunctive relief to remedy past acts. The Supreme Court in *Green* held that the Eleventh Amendment confirms that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless

Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. Id., at 99. The landmark case of *Ex parte Young*, 209 U.S. 123 (1908), created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. *Id*., at 159–160. The theory of *Young* was that an unconstitutional statute is void, *id*. at 159, therefore does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." Id., at 160. *Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. *Id.*, at 155–156, 159. The court has refused to extend the reasoning of *Young*, however, to claims for retrospective relief. See *Pennhurst*, supra, 465 U.S. at 102–103; *Quern v. Jordan*, supra, 440 U.S. at 337; *Edelman v. Jordan*, supra, 415 U.S. at 668. In short, by asking for declaratory relief finding past acts unconstitutional and for expungement for past acts, plaintiff is asking for retrospective relief.

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. See *Pennhurst*, supra, 465 U.S. at 102. See also *Milliken v. Bradley*, 433 U.S. 267 (1977). But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment. Therefore, plaintiff's claims against Livingston for injunctive and declaratory relief for past actions should be dismissed as a matter of law.

WHEREFORE PREMISES CONSIDERED, Defendant Brad Livingston prays that all claims against him in his personal or official capacity be dismissed for lack of jurisdiction, for

failure to state a claim, and by the defense of qualified immunity. Livingston also prays that venue be transferred to the Western District of Texas.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT BRAD LIVINGSTON

NOTICE OF ELECTRONIC FILING

I, KIM COOGAN, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing Defendant Livingston's Motion to Dismiss Under 12(b)(1) and (6) in accordance with the Electronic Case Files System of the Southern District of Texas, on the 17th day of February, 2015.

/s/ Kim Coogan
KIM COOGAN
Assistant Attorney General

CERTIFICATE OF SERVICE

I, KIM COOGAN, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Defendant Livingston's Motion to Dismiss Under 12(b)(6) has been served by placing same in the United States mail on this the 17th day of February, 2015 addressed to:

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