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

NATHAN ESSARY (#823377), Daniel Unit, Snyder, Texas,	)	
Plaintiff,	)	
	)	Civil Action No. H-02-3822
v.	)	
MICHAEL CHANEY, *et al.*,	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN OPPOSITION
TO DEFENDANT BARRATT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Nathan Essary, through his counsel, hereby responds to Defendant Jerry Barratt's Motion for Summary Judgment. Defendant Barratt has not met his burden of demonstrating that Plaintiff has failed to identify genuine issues of material fact for trial. Further, Defendant Barratt is not entitled to qualified immunity for his failure to protect the Plaintiff from sexual assault by Defendant Michael Chaney. Pursuant to Rule 56 (e) and (f), the affidavits and other evidence upon which Plaintiff relies are included in Plaintiff's Appendix.

I. THERE IS SUBSTANTIAL EVIDENCE FROM WHICH A FACTFINDER COULD CONCLUDE THAT BARRATT FAILED TO PROTECT ESSARY FROM HARM BECAUSE OF BARRATT'S DELIBERATE INDIFFERENCE TO THE RISK OF INJURY

In deciding this motion for summary judgment, the Court must view the record in the light most favorable to Plaintiff Nathan Essary. "The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Defendant Barratt, as the party requesting summary judgment, has the burden of

demonstrating that Nathan Essary has failed to identify a genuine issue of material fact, and if he fails to meet that initial burden, his motion for summary judgment must be denied. See Little v. Liquid Air Corp., 952 F.2d 841, 847 (5th Cir. 1992).

Defendant Barratt contends that he was not deliberately indifferent in failing to prevent Michael Chaney from sexually assaulting Nathan Essary on October 31, 2001 because (1) he was unaware that Nathan Essary was at significant risk of injury, and (2) once he learned about the risk he acted reasonably by ordering a job change for Essary. These two issues of fact are genuinely in dispute: Plaintiff has presented affidavits by competent witnesses to support his contention that Barratt did know of the risk before Chaney assaulted Essary, and that he did not act reasonably once he learned of the risk. These two disputed issues of material fact are central to Plaintiff's claim against Warden Barratt.

The first of these issues concerns Warden Barratt's state of mind -- his subjective awareness of the risk -- and hence cannot be resolved on summary judgment. See Worldwide Labor Support of Mississippi, Inc. v. United States, 312 F.3d 712, 715 (5th Cir. 2002) ("We conclude that whether the employer reasonably anticipated and calculated its employees' travel expenses in the course of developing its reimbursement arrangement is essentially one of state of mind and that so long as the employer produces summary judgment evidence that amounts to more than 'conclusory allegations, improbable inferences, and unsupported speculation,' the issues of reasonableness and state of mind are proper questions for the jury and should not be decided on summary judgment."). The second of these disputed issues involves the objective reasonableness of Warden Barratt's response to a known risk, and thus it is likewise an issue for trial, not summary judgment. See Mangieri v. Clifton, 29 F.3d 1012, 1016 (5th Cir.,1994) (summary judgment should be denied if there are "underlying

historical facts in dispute that are material to the resolution of the questions whether the defendants acted in an objectively reasonable manner." quoting Lampkin v. City of Nacogdoches, 7 F.3d 430 (5th Cir.1993)). See also Johnston v. City of Houston, 14 F.3d 1056, 1058-1061 (5th Cir.1994) (where the parties have "divergent versions of what happened" with regards to the force used by the police, the attempt by the arrestee to strike the arresting officer, and the effort by the officer to diffuse the situation, "the differing accounts" of the various parties preclude summary judgment on the basis of qualified immunity).

A. Statement of Facts

Before he sexually assaulted and raped Nathan Essary, Officer Michael Chaney was notorious at the Luther Unit as a sexual predator, and his propensities were well known to prisoners and staff. Officer Chaney openly commented on inmates' physiques and genitalia while they showered, and openly fondled and groped inmates under his supervision, in violation of TDCJ policy. [Ex. A, Decl. of N. Essary, ¶ 8; Ex. B, Decl. of G. Cunningham, ¶ 7; Ex. C, Decl. of M. Chapa, ¶¶ 6, 7; Ex. D, Decl. of T. Lee, ¶¶ 4, 10]. Imates often commented on his proclivities. [Ex. A, Decl. of N. Essary, ¶¶ 5, 6; Ex. C, Decl. of M. Chapa, ¶ 5; Ex. D, Decl. of T. Lee, ¶¶ 4, 6]. Officer Chaney, who weighed about 300 pounds, preyed on particularly vulnerable prisoners, who, like Nathan Essary, were young, slight in build, and with a history of mental illness.[Ex. B, Decl. of G. Cunningham, ¶ 15; Ex. D, Decl. of T. Lee, ¶ 8].

Over a period of at least eighteen months before Chaney assaulted Essary, a number of Chaney's other victims reported to Warden Barrett and other staff at Luther Unit that Chaney was preying on them. Warden Barratt ignored these complaints and neither investigated nor did anything else to prevent Chaney from continuing to victimize other prisoners. Officer Chaney frequently

bragged to prisoners about his personal friendship with Warden Barratt and threatened to use his connections with Barratt to get prisoners transferred to a rougher unit. [Ex. B, Decl. of G. Cunningham, ¶ 8; Ex. D, Decl. of T. Lee, ¶ 12,].

1. Warden Barratt learns that Chaney is victimizing inmate Garrett Cunningham.

In late 1999 or early 2000, Officer Michael Chaney began working in the Issue Room of the laundry. [Ex. B, Decl. of G. Cunningham, ¶ 5]. Within a few weeks, Chaney began sexually harassing one of the prisoners under his supervision, Garrett Cunningham. Cunningham was slightly built . [Ex. B, Decl. of G. Cunningham, ¶ 12]. Chaney repeatedly touched Cunningham in an intentionally sexual manner during pat searches, stared at Cunningham when he was in the shower, and made sexual comments. [Ex. B, Decl. of G. Cunningham, ¶ 7]. Defendant Chaney frequently bragged about his friendship with Warden Barratt and Major Ellis, and threatened to use his connections with them to file false disciplinary cases or get prisoners transferred to a rougher unit. [Ex. B, Decl. of G. Cunningham, ¶ 8].

Around March 2000, Cunningham told the Unit Psychologist, Mr. Mable, about Chaney's sexual harassment. Mable simply advised Cunningham to stay away from Chaney. [Ex. B, Decl. of G. Cunningham, ¶ 9]. In or around April 2000, Mr. Cunningham approached Warden Jerry Barratt and Major Ellis in the main hall and told them about Chaney's sexual comments and inappropriate pat searches. Major Ellis told him that he was exaggerating, that Chaney was just doing his job, and angrily told Cunninhgam to "get out of here." Warden Barratt stood there and said nothing. [Ex. B, Decl. of G. Cunningham, ¶ 10].

In June or July 2000, Mr. Cunningham again approached Defendant Barratt and Major Ellis. He told them again about the inappropriate pat searches and groin grabbing. Ellis again became

angry and told him to stop exaggerating and warned that he had better not hear any more of these complaints from Cunningham. Defendant Barratt again stood there and said nothing. [Ex. B, Decl. of G. Cunningham, ¶ 12].

In or around September 2000, Officer Chaney raped Mr. Cunningham. [Ex. B, Decl. of G. Cunningham, ¶ 14]. After locking the shower room doors, Chaney shoved Mr. Cunningham to the ground, handcuffed him, and anally raped him. [Ex. B, Decl. of G. Cunningham, ¶ ¶ 15, 16, 17]. Chaney told Mr. Cunningham that if he ever told, he would make sure that Cunningham did his whole sentence by getting Chaney's friends to write false assault cases against him, and that Mr. Cunningham would then be shipped to a rougher unit where he would be raped all the time. Chaney cautioned Mr. Cunningham not to say anything to Ellis or Barratt because they were his friends and would always help him out. [Ex. B, Decl. of G. Cunningham, ¶ 18].

On or about October 19, 2000, Cunningham told Unit Pyschologist Mable that Chaney had raped him. Mr. Mable told him to wait outside his office for a few minutes, then summoned him and said that he would get a job change. Mable told Cunningham that if anyone asked why his job was changed that he should say that he wanted "a change of scenery." A few days later, Cunningham was given a job change to work in the laundry, right next door to the issue room where Chaney worked. [Ex. B, Decl. of G. Cunningham, ¶ 19]. After his job change Chaney was openly hostile towards him. Even though he was no longer working for him, Chaney continued to subject Mr. Cunningham to inappropriate pat searches. [Ex. B, Decl. of G. Cunningham, ¶ 20].

In or about November 2000, Mr. Cunningham told Captain Rowe that Chaney was touching him inappropriately during pat searches. Captain Rowe responded that the grabbing during the pat searches was just an accident. Mr. Cunningham insisted that it was no accident and told her to watch

Chaney and see for herself. Captain Rowe told him to write a detailed letter about what Chaney was doing to him. He agreed to write the letter but said that he could not sign it because he was afraid of retaliation. [Ex. B, Decl. of G. Cunningham, ¶ 21]. Mr. Cunningham wrote the letter the same day he spoke with Rowe and placed it in the mail to her. [Ex. B, Decl. of G. Cunningham, ¶ 22].

Between November 2000 and April 2001, Mr. Cunningham wrote the Internal Affairs Department two times complaining that he was being inappropriately touched during pat-downs. He never received any replies. [Ex. B, Decl. of G. Cunningham, ¶ 24]. Around November 2001, he sent two more letters to IAD complaining about Chaney's inappropriate pat searches. [Ex. B, Decl. of G. Cunningham, ¶ 28].

2. Senior staff at Luther learns that Officer Chaney is victimizing inmate Michael Chapa.

Prisoner Michael Chapa began working in the laundry at Luther in February 2001. [Ex. C, Decl. of M. Chapa, ¶ 3]. Like Garrett Cunningham and other Chaney victims, Michael Chapa was young and small of stature. When he started working in the laundry, other prisoners warned Mr. Chapa not to be alone with Chaney; everyone knew that Chaney sexually harassed inmates. [Ex. C, Decl. of M. Chapa, ¶ 5]. Officer Chaney constantly sexually harassed him Mr. Chapa. Chaney frequently referred to him as his "little round brown" and "my love." He would approach Mr. Chapa from behind and rub up against him. He did this to other inmates as well. When Chaney pat-searched Chapa, he would rub and grab Chapa's genitals in a sexual manner. Other inmates did not want to stand near Mr. Chapa when officers were conducting strip-searches because they knew Chaney would choose Chapa and they might end up having to be searched and groped by Chaney as well. [Ex. C, Decl. of M. Chapa, ¶ 6].

In August 2001, when Mr. Chapa was working in the laundry, Chaney grabbed his face as if he was trying to kiss him. Laundry Officer Thornborough observed this incident and qustioned Mr. Chapa about it. Mr. Chapa told her that Chaney touched him inappropriately and that he wanted it to stop. [Ex. C, Decl. of M. Chapa, ¶ 7]. Not long afterwards, laundry officers Sergeant Sandals and Officer Campbell summoned Chapa and asked him what was going on in the laundry with Chaney. The officers said that they knew Chaney had touched him and that he had harassed other inmates as well. Mr. Chapa told them that Chaney made sexual comments that caused him to feel uncomfortable and that that was all he was going to say about the matter. [Ex. C, Decl. of M. Chapa, ¶ 8].

The following day Mr. Chapa told Laundry Room Captain Rowe that Chaney made sexual comments all the time, and that his pat searches were out of control. He told Captain Rowe that he was not going to lunch that day because he would have to be strip-searched to leave the laundry area and he would rather go hungry than have Chaney touching him. [Ex. C, Decl. of M. Chapa, ¶ 9].

A week or so later, in or around mid-September 2001, Chapa was summoned to a meeting with Mr. Cole of Internal Affairs, Senior Warden Laughlin and Captain Rowe. Mr. Cole asked Mr. Chapa questions about Chaney but Chapa refused to say anything because he felt that he was going to be in serious trouble for speaking out against Chaney. [Ex. C, Decl. of M. Chapa, ¶ 10]. Officer Chaney continued to sexually grope Mr. Chapa and to make sexual comments to him until he was transferred from the laundry a month or two later.

3. Warden Barratt learns that Officer Chaney is victimizing Inmate Troy Lee.

Sometime in 1999 or 2000 Troy Lee, a young inmate of slender build was assigned to work in the laundry at the Luther Unit on first shift. [Ex. D, Decl. of T. Lee, ¶ 5, 8]. After a month or two,

Lee was transferred to work for Chaney in the shower box. Other inmates noticed Chaney's treatment of Mr. Lee and would say that Chaney was "after him." William Crebbs, an inmate clerk in the laundry, told Lee that Chaney had requested his job change. [Ex. D, Decl. of T. Lee, ¶¶ 6, 7]

When Mr. Lee was transferred to work on the second shift shower box with Chaney, Chaney began sexually assaulting him. Chaney would sit and stare at him in the shower and brush up against him in a sexual manner and would hug, kiss and fondle him. Mr. Lee was afraid to confront Chaney and tried to stay away from him. [Ex. D, Decl. of T. Lee, ¶ 10].

Chaney was well known for writing false disciplinary charges against inmates. Often, these charges were quite serious in nature and Chaney would write them while other inmates were present. Chaney also constantly bragged about his close relationships with rank, informing the inmates he lent his beach house to Major Ellis, Warden Barratt and Captain Rice, and that those officers were his friends and protectors on the unit. When Chaney wrote out disciplinary charges he would call Warden Barratt or Major Ellis and tell them to code the offense as major. [Ex. D, Decl. of T. Lee, ¶ 12].

Officer Chaney first raped Mr. Lee several months after Mr. Lee started working for Chaney in the shower box. Chaney used his bulk to force Mr. Lee to the ground, handcuffed his hands behind his back, pulled down his pants and raped him. Chaney told him that if Lee said anything he would claim that Lee assaulted him. [Ex. D, Decl. of T. Lee, ¶ 15].

After the rape Mr. Lee told the Unit Psychologists, Mr. Mable and Mr. Howell, that an officer in the laundry was inappropriately touching and fondling him. Both psychologists told Mr. Lee that he was imagining things. [Ex. D, Decl. of T. Lee, ¶ 16]. Mr. Lee thereafter frequently complained to the Unit psychologists that Chaney was still sexually fondling and harassing him, but Mr. Mable and

Mr. Howell always responded either that he was probably mistaken or that his complaints were security issues they could not handle. [Ex. D, Decl. of T. Lee, ¶ 17].

Officer Chaney raped Mr. Lee a second time about two or three months after the first rape. Chaney wrestled him to the ground, sat on his stomach, forced Lee to perform fellatio, and then masturbated himself to ejaculation on the side of Mr. Lee's face. [Ex. D, Decl. of T. Lee, ¶ 18].

Following this second rape Mr. Lee told Laundry Captain Rowe that Chaney had forced him to perform sex in the bathroom near her office. She said that she would "look into it." She never spoke to Mr. Lee about the assault again. [Ex. D, Decl. of T. Lee, ¶ 20]. A week after Mr. Lee spoke with Captain Rowe, he wrote a letter to the Internal Affairs Department saying that he needed to speak with an investigator about what was happening in the Laundry at Luther. No one contacted Mr. Lee. [Ex. D, Decl. of T. Lee, ¶ 21].

Officer Chaney anally raped Mr. Lee again in or around the summer of 2001. [Ex. D, Decl. of T. Lee, ¶ 22]. After this third rape, Mr. Lee approached Warden Barratt, Major Ellis, Captain Rice and one other officer in the hall and told them that Chaney was touching and fondling him in the laundry. Warden Barratt said that Chaney was just doing his job and told Mr. Lee to get out of his face. [Ex. D, Decl. of T. Lee, ¶ 23]. In early September of 2001, Chaney again sexually assaulted Mr. Lee. [Ex. D, Decl. of T. Lee, ¶¶ 24, 25].

4. Warden Barratt learns that Officer Chaney is sexually assaulting Nathan Essary

In May of 2001, Plaintiff Nathan Essary was transferred from the mental health unit at Montford to the Luther Unit in Navasota, Texas as a minimum custody inmate. [Ex. A, Decl. of N. Essary, ¶ 3]. He was assigned to work in the laundry. [Ex. A, Decl. of N. Essary, ¶ 4]. Officer

Michael Chaney worked as a laundry manager. Chaney soon began paying unwelcome attention to Mr. Essary. Other inmates noticed this attention and remarked on it. [Ex. A, Decl. of N. Essary, ¶ 6];

After about a week, because Mr. Essary was afraid to tell officials that Defendant Chaney was acting in a sexually suggestive manner towards him, Mr. Essary told Captain Rowe, who was in charge of the laundry, that he needed a job change because his medication was making it difficult to wake up early. Mr. Essary was moved to the second shift and escaped from Defendant Chaney for a few months. [Ex. A, Decl. of N. Essary, ¶ 7].

Beginning in late July or early August 2001, however, Defendant Chaney was assigned periodically to the second laundry shift where Mr. Essary worked. Shortly thereafter, Chaney again began sexually harassing Essary, subjecting him to unwelcome and inappropriate touching, patting and rubbing his back and stroking his face. Chaney made unwelcome and inappropriate sexually-charged remarks, and questioned Mr. Essary about his sexuality and sexual habits. Chaney's harassment soon escalated; he began grabbing Mr. Essary by the buttocks and genitals. Chaney ignored Mr. Essary's pleas to stop the verbal harassment and unwanted touching. [Ex. A, Decl. of N. Essary, ¶ 8]. Officer Chaney told him that he could easily plant contraband in Essary's cell if he wanted, to make sure Essary did not go home. Chaney warned Mr. Essary that prison officials would always believe an officer over a prisoner. [Ex. A, Decl. of N. Essary, ¶ 9]. Other inmates observed Chaney sexually harassing Essary. [Ex. D, Decl. of T. Lee, ¶27].

In late September or early October of 2001, Defendant Chaney began making Mr. Essary work late as the laundry janitor, sending the other worker-inmates back to their cells early. [Ex. A, Decl. of N. Essary, ¶ 10]. One evening in early October 2001, after Mr. Essary had completed his janitorial duties, showered, and was getting dressed, Officer Chaney locked all the doors to the laundry and ordered him back into the shower room. Officer Chaney grabbed Mr. Essary's genitals,

and began kissing him. Officer Chaney ordered Mr. Essary into the bathroom in the Captain's office where he pulled down Mr. Essary's boxer shorts and ordered Essary to masturbate him, warning Essary that if he did not comply he would receive false disciplinary charges. [Ex. A, Decl. of N. Essary, ¶ 11]. After Mr. Essary obeyed Officer Chaney's orders and Chaney ejaculated, Chaney went to get a towel to clean up, leaving Mr. Essary alone for a moment. Mr. Essary used his handkerchief to wipe Chaney's ejaculate from his hand. When Chaney returned, he told Mr. Essary not to tell anyone what happened or he would make sure that Essary got into serious trouble. [Ex. A, Decl. of N. Essary, ¶ 12].

About a week after the first attack, Officer Chaney again ordered Mr. Essary to work late. Chaney ordered Essary into the Captain's bathroom, demanded sex from Mr. Essary and threatened to write him up if he refused. When Essary did refuse, Chaney warned him that he would make his life a "living hell" at Luther Unit if he did not do what he was told, and that Chaney only had to put money on gang members' accounts to get Mr. Essary killed. [Ex. A, Decl. of N. Essary, ¶¶ 14, 16]. Chaney then forced Mr. Essary to perform oral sex on him in the Captain's bathroom. Mr. Essary again used his handkerchief to wipe up some of Chaney's ejaculate and hid the handkerchief. [Ex. A, Decl. of N. Essary, ¶ 15].

On October 28 or 29, 2001, Mr. Essary asked for a lay-in to see a counselor. On the morning of October 31, 2001, he was called to meet with the Unit Psychologists, Mr. Mable and Mr. Howell. He told them about Chaney's sexual assaults and told them that he had saved DNA evidence. [Ex. A, Decl. of N. Essary, ¶ 18]. Mr. Howell told him that he had received complaints from other inmates about Officer Chaney. Mr. Howell later summoned Warden Barratt to meet with Essary.

When Essary told Barratt that Chaney had sexually assaulted him and that he needed protection, Barratt asked Essary if he would be willing to wear a wire to prove what he said was true. Mr. Essary replied that he was willing to do so. [Ex. A, Decl. of N. Essary, ¶ 20]. Warden Barratt told Essary that he would receive a job change and that people would come to see him to discuss his complaints against Chaney. Essary replied that he was worried because he was scheduled to work in the laundry with Chaney that very day. Defendant Barratt told him not to worry because he would get a job change. [Ex. A, Decl. of N. Essary, ¶ 21]. According to a document submitted by Warden Barrett in support of summary judgment, he did submit paperwork that day for a job change for Essary. Nevertheless, even though Barratt knew that Essary was scheduled to go to work with Chaney that day, there is no evidence that Barratt did anything to ensure that the job change would go into effect before Essary had to report to work with Chaney, or that Barratt warned Chaney to leave Essary alone.

That afternoon, Officer Chaney came to Essary's dormitory and ordered him to report to work. When Essary told him that he was supposed to receive a job change, Chaney replied that there was no record of a job change. Essary obeyed Chaney's order to report to work, because if he refused the order without proof of a job change he could receive a major disciplinary case that would add an extra year to his sentence before he would be eligible for parole review. [Ex. A, Decl. of N. Essary, ¶ 22]. That night, at the end of the shift, Officer Chaney again ordered Mr. Essary to work late after the other inmates had left the laundry. Chaney locked the outside doors, forced Mr. Essary into the Captain's bathroom, fondled and groped him, and ordered Mr. Essary to masturbate him. Essary obeyed. [Ex. A, Decl. of N. Essary, ¶ 23]. At about 10:00 PM that night, after Mr. Essary

returned to his dormitory, he was notified that he had been given a job change to the medical squad. [Ex. A, Decl. of N. Essary, ¶ 24].

Since no one came to talk to Mr. Essary about the rape and sexual assaults as Warden Barratt had promised, Mr. Essary decided to approach a female lieutenant who he thought might be concerned about what had happened to him. Mr. Essary told the Lieutenant about Chaney's assaults and the DNA evidence he had captured. The Lieutenant took Mr. Essary to see Major Ellis, who displayed anger with Mr. Essary for talking about the assaults. Major Ellis threatened to put Essary in lock-up so he would not talk to anyone else. [Ex. A, Decl. of N. Essary, ¶ 25].

On January 2, 2002, Defendant Michael Chaney was arrested for the aggravated sexual assault of Nathan Essary. [Ex. F, Arrest Warrant for Michael Chaney, 1/2/02]. Defendant Chaney has been charged with one count of Aggravated Sexual Assault and two counts of Improper Sexual Activity with a Person in Custody for his assaults on Nathan Essary. [Ex. G, Supplemental Offense Report, Investigator Mark Cole, 6/10/02].

B. Defendant Barratt Was Deliberately Indifferent to Significant Risks to Plaintiff's Safety.

In Farmer v. Brennan, 511 U.S. 825 (1994), the Court held that to prevail in a case involving failure to protect, a prisoner must show that he was incarcerated under conditions posing a substantial risk of serious harm, and that officials acted or failed to act with deliberate indifference, that is, with conscious disregard for that substantial risk. Id. at 839-840. The Court held that whether an official had the requisite knowledge of risk to be liable for failure to prevent the harm is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact finder may conclude that the official knew of a substantial risk from the very fact that it was obvious. Id. at 842. Thus, if a prisoner presents evidence that a substantial risk of attack was longstanding, pervasive, well-documented, or expressly noted by prison officials in the

past, and the circumstances suggest that the officials being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant official had actual knowledge of the risk. Id. at 842-43.

The record in this case contains ample evidence from which a fact finder could conclude that Warden Barratt knew, long before Chaney first assaulted Nathan Essary, that Officer Chaney posed a obvious risk to Nathan Essary.[1] Prior to any of the attacks on Mr. Essary, at least two other inmates -- Garrett Cunningham and Troy Lee -- had reported to Warden Barrett in Major Ellis' presence that Officer Chaney was sexually molesting them. Warden Barrett not only ignored their complaints, he also allowed Major Ellis to threaten these prisoners with punishment for reporting Chaney's misconduct.[2] Apart from this direct evidence that Warden Barrett knew of and consciously disregarded an obvious risk, there is substantial circumstantial evidence in the record from which a fact finder could conclude that the risk was so obvious that Warden Barrett must have known of and consciously ignored it. Officer Chaney was widely known by inmates and staff at Luther Unit for his sexual harassment of young men under his supervision. A number of inmates, including

[1]Under the Texas Penal Code, engaging in "sexual contact, sexual intercourse, or deviate intercourse" with an individual in custody is a state jail felony. TEX. PENAL CODE ANN. § 39.04 (West 2003). "Sexual Contact" is defined as "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." TEX. PENAL CODE ANN. § 21.01 (West 2003). Although Warden Barratt was informed that Officer Chaney was groping the genitals of inmates during pat searches, he took no steps to investigate these allegations, even though such action on the part of Officer Chaney would be a felony under Texas law. In light of the serious criminal nature of the allegations made against Officer Chaney prior to Mr. Essary reporting the rape and assault by Chaney to Defendant Barratt, it is even more difficult to understand Defendant Barratt's failure to take immediate steps to protect Mr. Essary, secure evidence, and initiate a criminal investigation of Chaney.

[2]Significantly, subsequent to the brining of this lawsuit, Defendant Barratt and TDCJ officials have also acted to intimidate, threaten, and tamper with the witnesses who establish that Warden Barratt was aware of the obvious risk of substantial harm posed by Officer Chaney. See Ex. B, Decl. of G. Cunningham, ¶¶ 31-38; Ex. C, Decl. of M. Chapa, ¶¶ 13-21; Ex. D, Decl. of T. Lee, ¶¶ 30, 33-43.

Cunningham and Lee, had reported his misconduct to the staff psychologists, as well as to Chaney's laundry room supervisor Captain Rowe. A month before Essary was assaulted, it came to the attention of Officer Thornborough, Sergeant Sandals, Officer Campbell, Captain Rowe, and Senior Warden Laughlin, that Officer Chaney had been sexually harassing inmate Michael Chapa. A fact finder could conclude from all this that Warden Barratt knew about the risk to young offenders under Chaney's supervision and with deliberate indifference to that risk failed to act to prevent Chaney from victimizing Essary and other similarly situated inmates. Even though "[a] prison official may show that the obvious escaped him, ... he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." Farmer, 511 U.S. at 843 n.8.

Defendant Barratt contends that he cannot be found to be deliberately indifferent because he ordered a job change for Nathan Essary after Essary complained to him. However, a fact finder could properly find that the only step Barratt took -- of ordering a job change for Nathan Essary -- was not an objectively reasonable response, but rather was far too little, too late. There is ample evidence from which a fact finder could conclude that Barratt knew full well that Chaney was a sexual predator; that Barratt callously ignored the complaints of Chaney's earlier victims in order to protect Chaney, with the predictable result that Chaney continued to prey on young men under his supervision, including Nathan Essary; and that Barratt took the step of ordering a job change for Essary only when he realized that Essary might actually have DNA evidence that would make it imposible for Barratt to continue shielding Chaney. A fact finder would also be entitled to conclude that merely ordering a job change for Nathan Essary, without issuing any warning to Chaney, without providing Essary with any proof that he need not report to work, and without otherwise ensuring that Chaney would not be able to further victimize Essary, was entirely unreasonable, given the overwhelming risk not only to Essary but to any other young offender assigned to work with Chaney

in the laundry. Warden Barratt makes no allegations that a job change ordered just prior to a shift would be processed that same day as a matter of routine.

II. DEFENDANT BARRATT IS NOT ENTITLED TO QUALIFIED IMMUNITY

Defendant Barratt argues that he is entitled to qualified immunity because "even though a state official may have erred, he is still entitled to qualified immunity if it can be shown that his actions were reasonable, albeit mistaken." Def. Br. at 4. This argument fails at every level due to outstanding issues of disputed material fact.

In reviewing a claim of qualified immunity, the Court must determine: "(1) whether the plaintiff has alleged a violation of a clearly established constitutional right; and, (2) if so, whether the defendant's conduct was objectively unreasonable in the light of the clearly established law at the time of the incident." Hare v. City of Corinth, 135 F.3d 320, 325 (5th Cir.1998). In the present case, Defendant Barratt does not contest that the constitutional right of offenders to be protected from harm was clearly established at the time of the rape and sexual assault by Officer Chaney.[3] The focus of Defendant Barratt's qualified immunity claim is the objective reasonableness of his actions once notified that Plaintiff Essary was subject to sexual assault and rape by Defendant Chaney.

[3]The Supreme Court has held that the 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, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). "[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. at 847, 114 S.Ct. 1970. In other words, the prison official must have a sufficiently culpable state of mind, which, in prison-conditions cases, is one of "deliberate indifference" to inmate health or safety. Id. at 834, 114 S.Ct. 1970. To find that an official is deliberately indifferent, it must be proven that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837, 114 S.Ct. 1970.

Following the Supreme Court's decision in Hunter v. Bryant, 502 U.S. 224, 227-28, 112 S.Ct. 534, 536-37, 116 L.Ed.2d 589 (1991), in evaluating a claim of qualified immunity, the courts make a determination of the objective reasonableness of the official's act as a matter of law. Lampkin v. City of Nacogdoches, 7 F.3d 430, 434-35 (5th Cir.1993). While a district court errs in "holding that the objective reasonableness prong of the qualified immunity standard is generally a factual question for the jury," Lampkin, 7 F.3d at 435, "even though [Hunter] diminished the jury's role in qualified immunity cases, it did not entirely abolish it." Id. See also, Presley v. City of Benbrook, 4 F.3d 405, 410 (5th Cir.1993) (if disputed facts remain relevant to the question of immunity, a jury may decide the question). Only when the court has a *clear picture of what occurred* during an incident giving rise to a qualified immunity defense, does the "reasonableness" question becomes one of law. Thus, a denial of summary judgment based on a material factual dispute is appropriate if there are "underlying historical facts in dispute that are material to the resolution of the questions whether the defendants acted in an objectively reasonable manner." Lampkin, at 435.

In Lampkin the parties disputed whether force was used against the plaintiffs, the amount of time the plaintiffs were detained, and whether any reason existed to detain the plaintiffs. The Court concluded that it was unable to make the determination of the objective reasonableness of the officer's activities for purposes of deciding a qualified immunity defense "without settling on a coherent view of what happened in the first place." Id. Similiarly, in Johnston v. City of Houston, 14 F.3d 1056 (5th Cir.1994), the Fifth Circuit rejected the defendant's claim to summary judgment on the qualified immunity issue because "[d]ivergent versions of what happened" had been offered by the parties. Id. at 1058. In Johnston, the court held that because a genuine dispute as to the material and operative facts of the case existed "...[s]ummary judgment is inappropriate unless plaintiff's version of the violations does not implicate clearly established law." Id. at 1061. In Goodson v. City of Corpus Christi, 202 F.3d 730 (5th Cir. 2000)(citing Johnston), the Fifth Circuit

held that a court cannot draw a conclusion of law from disputed facts. Id. at 739. See also Harper v. Harris County, 21 F.3d 597, 602 (5th Cir. 1994) (Distinguishing Hunter where material facts were undisputed and finding that while it is correct that the reasonableness of the arresting officer's conduct under the circumstances is a question of law for the court to decide, such is not the case where there exist material factual disputes. In Harper the plaintiff specifically denied that she attempted to evade arrest or detention, consequently the court found that the facts supporting her warrantless arrest were in serious dispute and turned on a credibility determination that can only be made by a jury); Cantu v. Jones, 293 F.3d 839, 845 (5th Cir. 2002) (affirming the trial court's denial of qualified immunity after trial because the jury found that the defendants acted with deliberate indifference and thus their behavior was objectively unreasonable). Moreover, a case which turns on the credibility of witnesses' testimony should not be resolved on summary judgment. See Bazan v. Hidalgo County, 246 F.3d 481, 492 (5th Cir.2001) (where the evidence a defendant police officer in a deadly force case claimed to be uncontradicted and unimpeached came from an interested witness, namely the defendant, court found that material facts as to the defendant's credibility were at issue and thus that a real--*genuine*--dispute existed as to the objective reasonableness of the defendant's conduct).

In the present case there is a genuine dispute as to the material and operative facts of the case that directly impacts on the "objective reasonableness" of Defendant Barratt's conduct. Significantly, Warden Barratt did not instruct Mr. Essary not to go to the Laundry Department to work anymore, nor did he tell Mr. Essary that if he was called out to work he should tell his supervisor (Defendant Chaney) that Warden Barratt had determined that Essary was not to go to work in the Laundry Department. Instead, when Mr. Essary raised the fact that he had to work that day, Warden Barratt told him, "Don't worry, you'll get a job change." Defendant Barratt also told Mr. Essary that someone would come to speak with him about his allegations. Contrary to the

contentions of Defendant Barratt, Plaintiff Essary was not aware that Warden Barratt consulted with Senior Warden Mark Laughlin regarding his allegations. Further, when Defendant Chaney arrived in Mr. Essary's dorm and instructed him to go to work, Mr. Essary told Defendant Chaney that he was supposed to have a job change and Defendant Chaney told him that he did not have any paperwork indicating that Mr. Essary had been given a job change so he had to go to work. If Mr. Essary had refused Defendant Chaney's order to go to work, he could have receive a major disciplinary case that would add an extra year to his sentence before he would be eligible for parole review.

Contrary to Defendant Barratt's assertions, Plaintiff Essary did not receive his job change slip until he returned from work on October 31, 2001, after being assaulted again by Defendant Chaney. Around 10:00 pm Plaintiff Essary was called out from his dorm and given a job change slip to the medical squad. No prison officials came to speak with Plaintiff Essary about his allegations of sexual assault by Defendant Chaney, so he approached a woman lieutenant and told her about the assaults and his DNA evidence. The lieutenant brought the matter to the attention of Major Ellis and only then did prison officials secure the DNA evidence, begin an investigation, and transfer Mr. Essary from Luther Unit beyond the reach of Defendant Chaney.

Prior to the time Nathan Essary reported the sexual assaults he suffered from Defendant Chaney, several other victims had come forward to TDCJ officials, and Warden Barratt in particular, about Chaney's sexually assaultive behavior towards inmates. Consequently, Plaintiff believes that Warden Barratt was fully aware of these accusations against Chaney before he met with Nathan Essary on October 31, 2001.

As in Lampkin, there are significant "underlying historical facts in dispute" in the present case that are "material to the resolution" of whether Defendant Barratt acted in an objectively reasonable manner. In this case, since so many discrepancies exist between the parties' accounts of

Defendant Barratt's actions leading up to and including his response to Mr. Essary's reporting the rape and sexual assault by Defendant Chaney, as a matter of law, a genuine dispute of material fact exists as to whether Defendant Barratt acted with deliberate indifference to the substantial risk of serious harm that Defendant Chaney posed to Mr. Essary. These disputed facts foreclose summary judgment on qualified immunity.

CONCLUSION

Defendant Barratt's Motion for Summary Judgment should be denied.

Respectfully submitted this ___ day of June, 2003

_____

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CERTIFICATE OF SERVICE

The undersigned attorney of record hereby certifies that a copy of the **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT BARRATT'S MOTION FOR SUMMARY JUDGMENT** mailed via federal express on this ___ day of June, 2003 to:

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