

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

Clifton Belcher,

Plaintiff,

v.

Case No. 03-3261-JWL

**United States of America; J.W. Booker;
Jon Loftness; Allen Beard; Cindy Anderson;
Scott Ashman; and Unknown-Named Government
Officials,**

Defendants.

MEMORANDUM & ORDER

Plaintiff filed suit seeking monetary damages for injuries he sustained while incarcerated at the United States Penitentiary (USP) in Leavenworth, Kansas. Specifically, plaintiff brings claims pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq., and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), based on defendants' failure to protect plaintiff from a November 21, 1999 assault by unknown inmates.¹ This matter is presently before the court on defendants' motion to dismiss or, in the alternative, for summary judgment on plaintiff's claims (doc. #25). As set forth in more detail below, the motion is denied as to plaintiff's *Bivens* claim against defendants Loftness, Beard, Anderson and Ashman in their individual capacities and is otherwise granted.

¹In his complaint, plaintiff asserts that his claims are also brought under 42 U.S.C. § 1983. However, because section 1983 applies only to state actors, and plaintiff's lawsuit challenges the actions of federal officials, his claim is properly asserted under *Bivens*. See *Kinnell v. Graves*, 265 F.3d 1125, 1127 n.1 (10th Cir. 2001)

I. Factual Background

The following facts are taken from plaintiff's complaint and the court, for purposes of analyzing defendants' motion to dismiss, assumes the truth of these facts. Plaintiff arrived at USP Leavenworth on April 19, 1999. Shortly thereafter, several inmates (whom plaintiff does not identify in his pleadings) verbally threatened plaintiff and plaintiff advised defendants Loftness, Anderson, Ashman and Beard about the threats he had received. According to plaintiff, defendants took no action at that time. On or about September 1, 1999, an inmate known as "Cornbread" approached plaintiff, advised him that he was "acting on the instruction of plaintiff's co-defendant," against whom plaintiff had testified, and threatened plaintiff's life. Thereafter, plaintiff "pointed out" this inmate to defendants Loftness and Anderson, advised them about the threat the inmate had made and further advised them that this inmate knew that plaintiff had cooperated with the government. Plaintiff also submitted to defendant Loftness an Inmate Request to Staff Member form (known in prison slang as a "cop out") in which he apparently requested a transfer to another facility. Defendant Loftness promised to forward the cop-out to defendant Beard.

On November 19, 1999, plaintiff met with his Unit Team, including defendants Anderson and Ashman. According to plaintiff, he advised defendants Anderson and Ashman during the course of this meeting that his life was in danger and that the "word was out" in the prison population. Defendants Anderson and Ashman advised plaintiff that he would be transferred in the near future and that he should maintain a "low profile" in the meantime. On November 21, 1999, the prison experienced a full-scale power failure. According to plaintiff, the officers on duty did not advise the prison population to lock-down; rather, the officers exited the housing unit and left

more than 300 inmates unattended and out of their cells. Plaintiff returned to his cell but did not lock the door because his cellmate was out “enjoying the turn of events.” While plaintiff was in his cell, three inmates entered the cell and assaulted plaintiff with a blunt object. Plaintiff sustained severe injuries to his head and face. According to plaintiff, one of his attackers was an inmate known as J-Loc; he could not identify the two other inmates involved in the attack.

II. Procedural History

This suit is the second suit that plaintiff has filed in an effort to recover damages for the November 21, 1999 assault. Plaintiff’s first suit, filed in September 2000, was initially assigned to Judge VanBebber of this court, who dismissed plaintiff’s complaint to the extent that plaintiff sought relief under *Bivens* and section 1983; dismissed the individual defendants and substituted the United States of America as the sole defendant for purposes of plaintiff’s FTCA claim; and ordered defendant to file a responsive pleading to the FTCA claim. In response, the United States filed a motion to dismiss or for summary judgment and, thereafter, plaintiff filed a motion to amend his complaint. The case was then transferred to Judge Belot. On November 19, 2001, Judge Belot dismissed with prejudice plaintiff’s FTCA claim based on the discretionary function exception but construed plaintiff’s proposed amended complaint as stating a potentially cognizable Eighth Amendment claim based on defendants’ alleged failure to protect plaintiff from other inmates. Thus, Judge Belot granted plaintiff’s motion to amend and allowed plaintiff to once again pursue a *Bivens* cause of action. Ultimately, however, Judge Belot dismissed plaintiff’s *Bivens* claim (and, thus, dismissed plaintiff’s complaint in its entirety) for failure to exhaust

administrative remedies. Now, after having apparently exhausted his administrative remedies, plaintiff has filed suit reasserting his *Bivens* claim as well as his FTCA claim.

III. Plaintiff's FTCA Claim Against the United States²

Defendants move to dismiss plaintiff's FTCA claim on the grounds that the claim is barred by the doctrine of res judicata. Res judicata, or claim preclusion, precludes a party from relitigating issues that were or could have been raised in an earlier action, provided that the earlier action proceeded to a final judgment on the merits. *King v. Union Oil Co.*, 117 F.3d 443, 445 (10th Cir. 1997) (citing *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274 (10th Cir. 1989) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980))). To apply the doctrine of res judicata, four elements must exist: (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit. *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (citing *Murdock v. Ute Indian Tribe*, 975 F.2d 683, 686 (10th Cir. 1992)).

In his complaint, plaintiff alleges that defendants failed to protect plaintiff during the power

²While it is unclear from plaintiff's complaint, the court construes plaintiff's FTCA claim as being asserted against only the United States and not against the individual defendants. *See Williams v. United States*, 2002 WL 31813058, at *2 (10th Cir. Dec. 16, 2002) (claims brought under the Federal Tort Claims Act are properly brought only against the United States and not against individual officers of the United States) (citing 28 U.S.C. § 2679(b)(1) and (d)(1)).

outage by leaving the housing unit during the outage (and, thus, allowed the assault to occur) and that defendants failed to act on plaintiff's complaints concerning the threats he had received from other inmates (and, thus, allowed the assault to occur). To the extent plaintiff alleges that defendants failed to protect him during the power outage, his FTCA claim is clearly barred by res judicata. Judge Belot expressly considered identical allegations in plaintiff's first suit against the United States and dismissed the claim with prejudice based on the discretionary function exception of the FTCA. Thus, defendants' motion to dismiss plaintiff's FTCA claim is granted to the extent plaintiff's claim is based on defendants' failure to protect plaintiff during the power outage. *See Redmon ex rel. Redmon v. United States*, 934 F.2d 1151, 1155 (10th Cir. 1991) (a determination of whether the FTCA excepts the government's actions from its waiver of sovereign immunity involves merits issues).

To the extent plaintiff's FTCA claim is based on defendants' failure to act on plaintiff's complaints concerning threats he received from other inmates, this claim is also barred by res judicata. Although plaintiff did not include these allegations in his initial complaint and, thus, Judge Belot did not address the allegations in his decision, plaintiff could have raised these allegations in his initial complaint. More importantly, applying the transactional approach to determine what constitutes a cause of action, *see Yapp v. Excel Corp.*, 186 F.3d 1222, 1227 (10th Cir. 1999) plaintiff should have raised these allegations at the time as they were part of the same cause of action alleged in the initial complaint. In that regard, plaintiff's theory that defendants failed to act on his complaints concerning threats from other inmates arises from the same event at issue in his initial FTCA claim—the November 21, 1999 assault. Moreover, plaintiff, in pursuing

this theory, is seeking to redress the same injury asserted in his initial FTCA claim. The claim, then, is barred. *See id.* (a cause of action includes all legal theories of recovery that arise from the same transaction, event or occurrence); *see also Plotner v. AT&T Corp.*, 224 F.3d 1161, 1170 (10th Cir. 2000) (“Essential to the application of the doctrine of res judicata is the principle that the previously unlitigated claim to be precluded could and should have been brought in the earlier litigation.”) (citations omitted); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4407 (2002) (a qualified judgment in the first action prevents litigation of all grounds for recovery that were previously available to the parties, regardless of whether they were asserted in the prior proceeding).

For the foregoing reasons, plaintiff’s FTCA claim against the United States is barred by res judicata.

IV. Plaintiff’s *Bivens* Claim

Plaintiff’s *Bivens* claim is based on defendants’ alleged failure to protect plaintiff from the November 21, 1999 assault in violation of the Eighth Amendment. Defendants move to dismiss this claim on a variety of grounds which the court addresses in turn.

A. Official Capacity Claims

As an initial matter, defendants move to dismiss plaintiff’s *Bivens* claim to the extent the claim is asserted against the individual defendants in their official capacities. The court agrees that this claim is appropriately dismissed. *See Steele v. Federal Bureau of Prisons*, 355 F.3d 1204,

1214 (10th Cir. 2003) (a *Bivens* claim cannot be brought against individual defendants in their official capacities).³

B. The United States as a Defendant

Defendants also move to dismiss plaintiff's *Bivens* claim to the extent the claim is asserted against the United States. This claim, too, is appropriately dismissed. See *Pickens v. Federal Bureau of Prisons*, 1997 WL 271326 (10th Cir. May 22, 1997) (United States is entitled to sovereign immunity on *Bivens* claim, as no *Bivens* action can be maintained against the United States or its agencies for compensatory damages) (citing *FDIC v. Meyer*, 510 U.S. 471, 484-85 (1994)).

C. The Unnamed Defendants

Defendants next move to dismiss plaintiff's claim against the unnamed government officials as plaintiff has alleged no facts sufficient to identify these individuals for service of process. See *Roper v. Grayson*, 81 F.3d 124, 126 (10th Cir. 1996) ("Courts have generally

³Plaintiff asserts that his claim against defendants in their official capacities should not be dismissed because he is seeking injunctive relief in addition to monetary damages. His prayer for injunctive relief, however, is not directed at the individual defendants; it is expressly directed at the Bureau of Prisons. Specifically, plaintiff requests that the Bureau of Prisons "make better decisions concerning where prisoners are sent that assist [the government]" and that the Bureau of Prisons "invest more time in properly testing emergency equipment." There are no allegations in plaintiff's complaint suggesting that any of the individual defendants have any authority regarding the relief sought by plaintiff. Thus, his official capacity claims against the individual defendants are properly dismissed.

recognized the ability of a plaintiff to use unnamed defendants so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so process eventually can be served.”). The court agrees with defendants. In his pleadings, plaintiff makes only one reference to a John Doe defendant, contained in his “memorandum in support” of his complaint. In that document, plaintiff alleges that defendants “Loftness, Anderson, Lt. Beard, Ashman, and John Doe set in motion a series of events. That he/she knew or reasonably should have known would cause the Plaintiff assault as herein described, even if others actually performed the assaulting act.” Without any other references to the John Doe defendant, this defendant simply cannot be identified for purposes of service of process. Plaintiff’s claim against the unnamed defendants, then, is dismissed.

D. Defendant J.W. Booker

Defendants next move to dismiss plaintiff’s *Bivens* claim against defendant J.W. Booker, Warden at USP Leavenworth, based on plaintiff’s failure to allege that Warden Booker personally participated in any alleged constitutional violation. *See Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003) (plaintiff must allege direct, personal participation on behalf of individual defendant in order to establish *Bivens* liability). A review of plaintiff’s complaint reveals that dismissal of the complaint as to Warden Booker is appropriate. In his memorandum in support of his complaint, plaintiff asserts that Warden Booker should be held liable as an “overseer of authority . . . under the doctrine of respondent [sic] superior.”

It is well established, however, that the doctrine of respondeat superior cannot support

liability under *Bivens*. See *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976); see also *Kaiser v. Lief*, 874 F.2d 732, 736 (10th Cir. 1989) (holding doctrine of respondeat superior does not apply to “an officer who has no affirmative link with the constitutional violation”). To hold Warden Booker liable, plaintiff must allege facts showing that an affirmative link exists between the alleged constitutional deprivation and Warden Booker’s “personal participation, his exercise of control or direction, or his failure to supervise.” See *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1187 (10th Cir. 2003). Even under a liberal construction of plaintiff’s complaint, plaintiff has not stated a claim for supervisory liability against Warden Booker as the complaint simply does not allege any affirmative link between any conduct on the part of Warden Booker and any alleged constitutional deprivation. Plaintiff’s complaint is dismissed, then, as to Warden Booker.⁴

E. The Remaining Defendants

The remaining defendants—Loftness, Beard, Anderson and Ashman—move to dismiss plaintiff’s Eighth Amendment claim on the grounds that the allegations in plaintiff’s complaint fail

⁴Defendants also move to dismiss plaintiff’s complaint as to Warden Booker and Lieutenant Beard for failure to effect proper service on those defendants. While the court need not address this issue as it is otherwise dismissing plaintiff’s complaint, the court would deny defendants’ motion on this basis. As plaintiff is proceeding in forma pauperis, he is entitled to rely on the United States Marshal Service for service of the summons and complaint. See *West-Anderson v. Choicepoint Servs., Inc.*, 2002 WL 169416, at *2 (D. Kan. Jan. 28, 2002) (citations omitted). In such circumstances, insufficient service is not the responsibility of the plaintiff and the plaintiff, assuming the necessary information has been provided, is generally not penalized with dismissal of the complaint. See *id.* Rather, the court typically orders the clerk of the court to prepare and issue another summons and orders the United States Marshal Service to correct the deficiency in service. See *id.*

to state a claim under the Eighth Amendment. As explained above, plaintiff's claim is based on defendants' failure to protect plaintiff from an attack by other inmates. It is well established that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). The Eighth Amendment, however, is not violated unless a prison official shows "deliberate indifference" to a "substantial risk of serious harm to an inmate." *Id.* at 828. To establish a cognizable Eighth Amendment claim for failure to protect, the 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). *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003).

The subjective component of the deliberate indifference test requires that, before liability can be imposed, a prison 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.* (citing *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998)). The Supreme Court has explained that "deliberate indifference entails something more than mere negligence . . . [but] something less than acts or omissions for the very purpose of causing harm or with the knowledge that harm will result." *Id.* (citing *Farmer*, 511 U.S. at 835). The Court defined this "deliberate indifference" standard as equal to "recklessness," in which "a person disregards a risk of harm of which he is aware." *Id.* (citing *Farmer*, 511 U.S. at 836-37).

According to defendants, the facts as alleged by plaintiff fail to demonstrate an Eighth Amendment violation because plaintiff has alleged no nexus between the risk to which defendants

were allegedly deliberately indifferent and the harm that actually occurred. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1320 (10th Cir. 2002) (deliberate indifference must operate as a causal link to plaintiff's injuries); *Haley v. Gross*, 86 F.3d 630, 643 n.33 (7th Cir. 1996) (plaintiff must show some link between the risk of which the official was aware and the harm that actually occurred). In that regard, defendants contend that plaintiff has not alleged that "Cornbread" was one of his attackers and has not shown that the threat from "Cornbread" was related in any way to his attack. The court disagrees and concludes that a liberal reading of plaintiff's complaint permits the inference that plaintiff's attack was based on the fact that he had cooperated with the government during the trial of one of his co-defendants.

Plaintiff alleges that the threat from Cornbread was motivated by plaintiff's cooperation and he further alleges that, at least by November 1999, the "word was out" in the prison. A reasonable inference from plaintiff's allegation is that it was well known throughout the general prison population that plaintiff had cooperated with the government. Thus, the court cannot say as a matter of law that plaintiff will be able to prove no set of facts showing a causal connection between the threats he received (and, more specifically, the concerns he reported to defendants) and the injuries he sustained. The motion to dismiss, then, is denied. To the extent defendants move for summary judgment on this basis, evidence submitted by the defendant further supports the requisite link between the threats received by plaintiff and the attack. In that regard, the investigative report submitted by defendants concerning plaintiff's assault indicates that when plaintiff was interviewed immediately after the assault, he specifically stated that he was attacked "over my PSI." Plaintiff's pre-sentence investigation (his "PSI"), of course, would contain

information that he had cooperated with the government. The report also states that a confidential informant advised prison officials that plaintiff “brought [the attack] on himself because he made it be [sic] known to a lot of inmates that he had testified against his homies in North Carolina.” At a minimum, then, fact issues exist concerning whether plaintiff’s attack was connected to previous threats he had received and of which he made defendants aware.

Defendants also move for summary judgment on the grounds that the uncontroverted evidence reveals that plaintiff never submitted a written cop-out to defendant Loftness and never filed an administrative remedy regarding his safety. Defendant Loftness further avers that plaintiff expressly told him that “Cornbread” had not threatened him but that plaintiff “had a problem with him on the street.” According to defendant Loftness, defendant Loftness interpreted plaintiff’s remarks as a “for-your-information situation.” In a related vein, defendants Anderson and Ashman have each submitted affidavits stating that plaintiff did not advise them during his Unit Team review about any threat to his safety. According to defendants, then, plaintiff has not shown a “substantial risk of serious harm.”

Again, the court disagrees. In his verified complaint and his verified “memorandum in support” of his complaint, which the court construes as an affidavit for purposes of summary judgment, *see Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988) (a verified complaint may be treated as an affidavit for purposes of summary judgment if the allegations contained therein are based on personal knowledge, would be admissible at trial, and show that plaintiff is competent to testify on the matters stated therein), plaintiff states that he submitted a written cop-out to defendant Loftness and that he specifically advised defendants Loftness and Anderson that

“Cornbread” knew that plaintiff had cooperated with the government. He further states that he advised defendants Anderson and Ashman during his Unit Team review that his life was in danger because the “word was out” in the prison population. Viewing the evidence in the light most favorable to plaintiff, a reasonable jury could conclude that defendants were subjectively aware of a substantial risk of serious harm to plaintiff. This is particularly true in light of plaintiff’s further allegation that defendants advised him to keep a “low profile” and assured him that he would be transferred in the near future.

Defendants advance no other arguments concerning whether plaintiff has stated a violation of the Eighth Amendment. Thus, the motion to dismiss on this basis is denied.⁵

Defendants’ final argument in support of their motion is that they are entitled to qualified immunity on plaintiff’s claim. Qualified immunity protects government officials performing discretionary functions from individual liability under *Bivens* unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of qualified immunity is to avoid excessive disruption of governmental functions and to dispose of frivolous claims in the early stages of litigation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Supreme Court has reiterated that qualified immunity gives officials “a right, not merely to avoid ‘standing trial,’ but also to avoid the burdens of ‘such pretrial matters

⁵While the court can envision reasons why plaintiff’s complaint might fail to state a claim under the Eighth Amendment, the court focuses only on the arguments that have been made by defendants.

as discovery.” *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Consequently, the Supreme Court has explained “that courts should resolve the ‘purely legal question,’ *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), raised by a qualified immunity defense ‘at the earliest possible stage in litigation.’” *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

In evaluating a claim for qualified immunity, the court must first determine whether the facts alleged, considered in the light most favorable to the plaintiff, state the violation of a constitutional right. *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1207 (10th Cir. 2002). If so, the court must go on to determine whether the constitutional right was clearly established at the time of injury. *Id.* If the answer to either of these questions is no, the defendant is entitled to qualified immunity. *Id.*

In their briefing on the qualified immunity question, defendants simply incorporate by reference their arguments regarding plaintiff’s failure to state an Eighth Amendment violation (arguments which the court has rejected) and then summarily state that a reasonable prison official in defendants’ place would not have considered his or her conduct violative of the Eighth Amendment because plaintiff’s claim is based on defendants’ failure to protect plaintiff from an “unexpected” attack. As explained above, however, a fair reading of the allegations contained in plaintiff’s complaint suggests that the attack was not “unexpected.” While the attack may have occurred during an unexpected power outage (and, indeed, the power outage may have enabled the attack to occur), the court cannot say that the attack itself was “unexpected” as plaintiff has alleged that he advised defendants of the threats he received and that it was well known in the prison

population that he had cooperated with the government. Defendants, then, have not shown that they are entitled to qualified immunity.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion to dismiss (doc. #25) is **granted in part and denied in part**. Plaintiff's "motion to alert court" that he did not receive a complete copy of defendants' reply brief (doc. #38) is **moot** in light of defendants' certification that they have sent a complete copy of their reply brief to plaintiff.

IT IS SO ORDERED this 29th day of September, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge