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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MARLIN RIGGS, et al,)	Case No. 1:09-cv-00010-BLW
)	
Plaintiffs,)	
)	
vs.)	DECLARATION OF JOSHUA KELLY
)	
PHILIP VALDEZ, et al,)	
)	
Defendants.)	

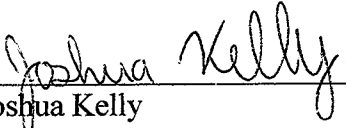
I, Joshua Kelly, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746
as follows:

1. I am over the age of 18 and am competent to testify.

2. On October 9, 2009, I was incarcerated at the Idaho Correctional Center (ICC) in J-Pod, which is located in the North Wing of ICC. I was informed that morning by staff that I was going to be moved to the West Wing of ICC.
3. I am a member of a Hispanic gang. There is at least one other Hispanic gang at ICC. ICC makes an effort to keep the two gangs separated.
4. In J-Pod, I was housed with members of my gang. Members of the other gang were not housed in J-Pod. Rather, they were housed in the West Wing of ICC. There have been many fights at ICC when members of the two gangs have come into contact with one another.
5. When I was told that I would be moving to the West Wing, I immediately knew that I would be in danger of being assaulted by members of the rival gang. I promptly told my Case Manager, Ms. Fink, about the problem and asked that I not be moved.
6. In my opinion, Ms. Fink did know and had to have known that I was associated with a gang and that I faced a high likelihood of assault if I were moved to the West Wing. The information that I am a member of a gang would be in my prison files, which I believe staff are required to review prior to moving a prisoner.
7. I was told by staff that unless I moved to the West Wing, I would be issued a Disciplinary Offense Report (DOR), which would hurt my chances of obtaining a parole.
8. I was moved to West Wing over my strong objections.
9. Also moved to West Wing with me were Andrew Ibarra and Joe Rocha. Both of them are viewed by other prisoners as associated with the same gang as I. I therefore knew that they would be at risk of assault in the West Wing, as I was.
10. A short while after our arrival, it was time for dinner, and our Pod was escorted to the chow hall. While Mr. Ibarra, Mr. Rocha, and I were eating dinner, we were attacked by at least ten prisoners.
11. After I was assaulted, I was taken to segregation, and I was issued a DOR for fighting.
12. I should not have been issued a DOR for fighting. For one thing, ICC staff should not have transferred me to the West Wing in the first place, and it was their error that caused this incident to occur. Second, I had not been fighting.

13. I wanted to challenge the DOR because I was not guilty of fighting. I also wanted to complain about the fact that staff had placed me at risk of being assaulted. I was assaulted as a result of their disregard for my safety. Staff failed to protect me from assault.
14. Soon after entering segregation, I asked an officer for a Concern Form so that I could complain about the fact that staff put me in danger. I believe the name of the officer was Officer Soto.
15. I told the officer that I wanted to file a complaint about the fact that staff had placed me at risk of being assaulted. Officer Soto told me that the way to do that was to raise the issue during my DOR hearing. He said that I couldn't file a grievance because I had been issued a DOR.
16. I wasn't sure if this officer was correct, and I didn't want to lose my right to raise the failure to protect issue. So I submitted a Concern Form to my Case Manager, Ms. Fink.
17. Attached as "Kelly Exhibit 1" is the Concern Form I submitted to Ms. Fink. As this shows, I complained both about the fact that staff had placed me at risk and failed to protect me and about the fact that I had been issued a DOR even though I had not been fighting. As shown by Ms. Fink's response, she informed me that I needed to raise both issues through the DOR process, which I then did.
18. During my DOR hearing, which was recorded, I told the hearing officer that I was not guilty of fighting. I explained the fact that staff had made a mistake in the first place by moving me to West Wing. The hearing officer dismissed the DOR.
19. Based on what the officer in segregation told me and what Ms. Fink told me, it was and is my understanding that if a prisoner has received a DOR, he must raise every issue as part of the DOR process, including complaints about a failure to protect. A prisoner is not allowed to raise a failure to protect issue through the Grievance process when he has been issued a DOR.
20. Thus, as I understand the administrative process at ICC, I took all steps to exhaust my failure to protect claim. I did exactly what Ms. Fink and the officer instructed me to do. Given that my DOR was dismissed, I did not need to appeal the decision of the Hearing Officer to the facility head. I didn't appeal Ms. Fink's denial of my Concern Form because I trusted that she was correct when she told me that I couldn't raise that issue through the Grievance process.

Dated this 23rd of July, 2010.



Joshua Kelly