

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

KEITH BARTELLI,

:

Plaintiff

CIVIL NO. 3:CV-04-0901

-vs-

(Judge Kosik)

KENNETH BURNETT,

Defendant :

MEMORANDUM AND ORDER

NOW, this 28th day of May, 2004, IT APPEARING TO THE COURT THAT:

(1) Plaintiff, Keith Bartelli, an inmate confined at the State correctional Institution at Dallas, filed the instant civil rights action pursuant to 42 U.S.C. §1983 on April 26, 2004;

(2) The matter was assigned to Magistrate Judge Thomas M. Blewitt;

(3) ON May 5, 2004, the Magistrate Judge filed a Report and Recommendation in which he recommended that the action against Kenneth Burnett, the sole defendant, be dismissed for failure to state a claim against him pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) and as time barred;

(4) Specifically, the Magistrate Judge found that the plaintiff failed to state a cognizable §1983 retaliation claim against defendant Burnett and that he failed to establish a constitutional violation with respect to the filing of grievances. Moreover, the Magistrate Judge found plaintiff's claims were time barred by the statute of limitations;

(5) No objections were filed to the Magistrate Judge's Report and Recommendation;

AND, IT FURTHER APPEARING THAT:

(6) If no objections are filed to a Magistrate Judge's Report and Recommendation, the plaintiff is not statutorily entitled to a *de novo* review of his claims. 28 U.S.C.A. §636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53 (1985). Nonetheless, the usual practice of the district

court is to give "reasoned consideration" to a magistrate judge's report prior to adopting it. Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987).

(7) Having considered th Magistrate Judge's Report, we agree with the recommendation;

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

(1) The Report and Recommendation of Magistrate Judge Thomas M. Blewitt dated May 5, 2004 (Document 6) is **ADOPTED**;

(2) The plaintiff's claims against defendant Burnett are **DISMISSED**; and,

(3) The Clerk of Court is directed to **CLOSE** this case and to forward a copy of this Memorandum and Order to the Magistrate Judge.

s/Edwin M. Kosik
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KEITH BARTELLI,

CIVIL ACTION NO. **3:CV-04-0901**

Plaintiff

:

(Judge Kosik)

v.

(Magistrate Judge Blewitt)

KENNETH BURNETT,

Defendant

REPORT AND RECOMMENDATION

The Plaintiff, currently an inmate at the State Correctional Institution at Dallas ("SCI-Dallas")¹ filed this civil rights action on April 26, 2004, pursuant to 42 U.S.C. § 1983. (Doc. 1). The Plaintiff also filed an *in forma pauperis* application. (Doc. 2). We must preliminarily screen the Complaint.

I. Introduction.

The Prison Litigation Reform Act of 1995,² (the "Act"), obligates the Court to engage in a screening process when a prisoner wishes to proceed *in forma pauperis* pursuant to 28 U.S.C.

¹Plaintiff has a civil rights action currently pending before this court. See Civil No. 04-0052, M.D. Pa. Plaintiff's former action was dismissed without prejudice. See Civil No. 03-0234, M.D. Pa. Upon screening Plaintiff's pending complaint (04-0052), we found that Plaintiff raised many unrelated claims in violation of Fed. R. Civ. P. 20. We required Plaintiff to amend his complaint with respect to only related claims and Defendants, and to file separate actions for unrelated claims and Defendants. Plaintiff then filed 12 new actions, including the above captioned case, with this Court on April 26, 2004, Civil Nos. 04-899 through 04-910. We now screen these new actions.

²Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996).

§ 1915.³ Specifically, § 1915(e)(2), which was created by § 805(a)(5) of the Act, provides:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

We have reviewed the allegations of the Complaint and have determined that the Defendant named in the Complaint is subject to dismissal pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) and that this action is subject to dismissal since the claim against him is time barred. Further, the Plaintiff's claim regarding the Defendant's manner of processing his grievances and his retaliation claim against the Defendant fail to state cognizable claims.

In an action brought pursuant to 42 U.S.C. § 1983, the Plaintiff must prove the following two essential elements in order to state a claim: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct complained of deprived the Plaintiff of rights, privileges or immunities secured by the law or the Constitution of the United States. *Parratt v. Taylor*, 451 U.S. 527 (1981). The Plaintiff is well aware of the requirements in a §1983 action based on his previous lawsuit (Civil No. 04-0052).

³The Plaintiff completed an Application to Proceed *in forma pauperis* (Doc. 2) and authorization to have funds deducted from his prison account. (Doc. 3). The Court then issued an administrative order directing the warden to commence the withdrawal of the full filing fee due the court from the Plaintiff's prison trust fund account.

In his pleading, the Plaintiff names Kenneth Burnett, Grievance Coordinator at SCI-Dallas, as the sole Defendant.

The Plaintiff seeks compensatory and punitive damages as well as injunctive relief. (Doc. 1, p. 3, ¶ V.).

II. Standard.

When evaluating a pleading for failure to state a claim, the court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 44-46 (1957); *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). A complaint that sets out facts which affirmatively demonstrate that the plaintiff has no right to recover is properly dismissed without leave to amend. *Estelle v. Gamble*, 429 U.S. 97, 107-108 (1976). A complaint filed by a *pro se* party should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (citation omitted).

III. Discussion.

1. Statute of Limitations.

The Plaintiff alleges that on or about April, 2000, while he was incarcerated at SCI-Dallas, he filed grievances and began to notice deliberate delays in processing and responding to those grievances. Plaintiff avers that the Defendant was responsible for retaliatory misconducts filed against him by other unnamed prison staff by delaying the processing of his grievances. The

Plaintiff also avers that the Defendant was biased in his responses to the grievances. (Doc. 1, p. 2, ¶ IV.). Plaintiff does not aver that the Defendant himself filed any retaliatory misconduct against him (Plaintiff). We find that the Plaintiff's claim about the processing of his grievances and his retaliation claim against the Defendant are time barred.

The Plaintiff's claims against the Defendant are time barred by the two-year statute of limitations. All of the conduct taken by the Defendant which the Plaintiff alleges in this case admittedly commenced in April, 2000. (Doc. 1, p. 2 ¶ IV. 1.). The Plaintiff also alleges that this Defendant caused others to issue false misconducts against him at this time. (*Id.*). There are no further claims against the Defendant.

The Plaintiff clearly discovered his cause of action against the Defendant in this case well over two years before he filed this case in April, 2004. The law is clear that Section 1983 claims are subject to a two-year statute of limitations. *See Bougher v. University of Pittsburgh*, 882 F. 2d 74, 78-79 (3d Cir. 1989); *Fitzgerald v. Larson*, 769 F. 2d 160, 162 (3d Cir. 1985). Further, under Pennsylvania's discovery rule, the statute of limitations begins to run when the Plaintiff has discovered his injury or, in the exercise of reasonable diligence, should have discovered his injury. *Doe v. Kohn, Nast & Graf, P.C.*, 866 F. supp. 190 (E.D. Pa. 1994); *Cochran v. GAF Corp.*, 633 A.2d 1195 (Pa. Super. 1993). It is abundantly clear in this case, and readily admitted by the Plaintiff, that he first discovered his cause of action against Defendant in April of 2000, as he knew he was being retaliated against by others (not our Defendant) at this time, and he knew that the misconducts were fabricated in April, 2000. Therefore, Defendant Burnett is subject to dismissal since the statute of limitations with has expired respect to the claims against him.

2. *Respondeat Superior.*

The Plaintiff's Complaint contains no specific retaliation claim as against Defendant Burnett. Plaintiff only states that the Defendant was responsible for retaliatory misconducts filed by others due to his delay in responding to his grievances. The Plaintiff does not allege that Defendant Burnett had any personal involvement in the alleged retaliation against him. Nor does Plaintiff claim that Defendant Burnett had any involvement in the alleged fabrication of misconducts against him. (*Id.*).

A Defendant prison official cannot be held liable for the actions of others since the doctrine of *respondeat superior* is not an acceptable basis for liability under § 1983. See *Durmer v. O'Carroll*, 991 F. 2d 64, 69 (3d cir. 1993). Liability may only be based upon Defendant's personal involvement in conduct amounting to a constitutional violation. *Hampton v. Holmesburg Prison Officials*, 547 F. 2d 1077 (3d Cir. 1976). The Supreme Court has also ruled that liability cannot be premised on the doctrine of *respondeat superior*. *Rizzo v. Goode*, 423 U.S. 362 (1976). As discussed, the Plaintiff does not allege any personal involvement by Defendant Burnett with respect to his retaliation claim in this case. Plaintiff does not even allege that this Defendant played any role in any of the retaliatory misconducts issued. Therefore, Plaintiff clearly does not state a cognizable § 1983 retaliation claim against Defendant Burnett, and this Defendant should be dismissed.

3. Responding to Grievances Claim.

Moreover, the only specific allegation as to Defendant Burnett is that the Defendant delayed in processing and responding to Plaintiff 's grievances and that he was biased in his responses to the grievances. (*Id.* at p. 2). The Plaintiff has not alleged a constitutional violation with respect to the filing of his grievances and with respect to Defendant Burnett's responses to them.

The law is well-settled that there is no constitutional right to a grievance procedure. See *Jones v. North Carolina Prisoners' Labor Union, Inc.* 433 U.S. 119, 137-138 (1977). This very court has also recognized that grievance procedures are not constitutionally mandated. See *Chimenti v. Kimber*, Civil No. 3:CV-01-0273, slip op. at p. 18 n. 8 (March 15, 2002) (Vanaskie, C.J.). Even if the state provides for a grievance procedure, as Pennsylvania does, violations of those procedures do not amount to a §1983 cause of action. *Mann v. Adams*, 855 F. 2d 639, 640 (9th Cir 1988), *cert denied*, 488 U.S. 898 (1988); *Hoover v. Watson*, 886 F. Supp. 410, 418 (D. Del. 1995), *aff'd* 74 F. 3d 1226 (3d Cir. 1995).

The Plaintiff makes no specific allegations against Defendant Burnett as to how he was biased in his responses to Plaintiff's grievances,,nor does he specifically claim how this Defendant acted improperly regarding his grievances. Thus, Plaintiff fails to even assert that his rights were violated by the Defendant's failure to properly respond to his grievances. We find that the Plaintiff's action against this Defendant, in which he implicates the manner in which his grievances were handled, as well as the responses to his grievances, is subject to dismissal as it does not state a constitutional violation.

Therefore, this claim should be dismissed as against Defendant Burnett.

4. Retaliation Claim Against Defendant.

Plaintiff avers that the Defendant was responsible for many of the retaliatory misconducts filed against him by others due to the manner in which the Defendant processed and responded to his grievances.

Plaintiff has not stated a retaliation claim against the Defendant. In *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001), the Court indicated that, as a threshold matter in a retaliation case, the prisoner must show that the conduct which led to the alleged retaliation was constitutionally protected. Here, Plaintiff fails to meet this threshold requirement of such a claim regarding Defendant's responses to his grievances, since he has not asserted that the Defendant retaliated against him. Nor has the Plaintiff implicated a constitutionally recognized right with respect to the Defendant's responses to his grievances, as discussed above.

In *Rauser*, the Court also stated that "a prisoner litigating a retaliation claim must show that he suffered some 'adverse action' at the hands of the prison officials." *Id.* Plaintiff has not sufficiently alleged that he suffered adverse actions by Defendant.⁴ The stated retaliatory conduct which the Plaintiff claims to have suffered (*i.e.* false misconduct reports), has not been sufficiently linked to the Defendant. The alleged retaliatory conduct was all performed by others at the prison. Therefore, we shall recommend that the Defendant be dismissed for failure of Plaintiff to state a claim against him.

⁴To establish a retaliation claim, the Plaintiff must also show that there exists a causal nexus between the Plaintiff's constitutionally protected conduct and the adverse action. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996).

While we are well cognizant that a *pro se* prisoner should be freely given leave to amend, the Plaintiff has been allowed to amend his case pending before this Court (04-0052) after he was fully advised of the requirements in a §1983 suit. See Doc. 14, Civil No. 04-0052, M.D. Pa. Thus, the Plaintiff was well aware of the requirements of a § 1983 suit before he filed the instant action. Further, we find that any amendment in this case would be futile. See *Fauver v. Shane*, 213 F. 3d 113, 116-17 (3d Cir. 2000).

IV. Recommendation.

Based on the foregoing, it is respectfully recommended that this action against Defendant Burnett be dismissed for failure to state a claim against him pursuant to 28 U.S.C. §1915(e)(2)(B)(ii). Further, it is recommended that this action be dismissed since it is time barred.

s/ Thomas M. Blewitt
THOMAS M. BLEWITT
United States Magistrate Judge

Dated: May 5, 2004

IN THE UNITED STATES DISTRICT COURT
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KEITH BARTELLI,

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Plaintiff

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Defendant

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing

Report and Recommendation dated **May 5, 2004**.

Any party may obtain a review of the Report and Recommendation pursuant to

Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the

magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

s/ Thomas M. Blewitt
THOMAS M. BLEWITT
United States Magistrate Judge

Dated: May 5, 2004