

FILED  
HARRISBURG, PA

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

AUG 6 1997

PETER COOK,  
Plaintiff

MARY E. D'ANDREA, CLERK  
Per *JTB*

vs.

: CIVIL ACTION NO. 1:CV-95-1759

: (Judge Caldwell)

TONY ROSS, et al.  
Defendants

Trial in this matter was held July 30, 1997, and we are prepared to deliver our findings of fact, conclusions of law and a verdict and judgment.

FINDINGS OF FACT

1. Plaintiff, Peter Cook, is an inmate at the State Correctional Institution at Camp Hill, incarcerated in the Special Management Unit ("SMU").

2. Defendants, Lieutenant Nathan Beaston, Sergeant John Kelly, and Corrections Officers Kevin Grace, Anthony Ross, and Teresa Sohnleitner, are employees of the Pennsylvania Department of Corrections, all of whom were, on October 7, 1995, assigned to the SMU.

3. On October 7, 1995, Defendants Beaston, Kelly, Grace, Ross, and Sohnleitner, along with Corrections Officer Leggore, were conducting a random search of inmate cells in the SMU. Plaintiff's cell was among those searched.

Certified from the record  
Date 8/6/97  
Mary E. D'Andrea, Clerk  
Per Georgette Gardner  
Deputy Clerk

4. During the search of Plaintiff's cell, he was handcuffed and placed outside of the cell, in a position where he could observe the conduct of the officers conducting the search.

5. While the cell was being searched, Plaintiff complained loudly and disruptively that Officer Leggore was disposing of Plaintiff's legal materials.

6. Defendant Beaston ordered Plaintiff to be quiet.

7. Despite Defendant Beaston's order, Plaintiff continued to be loud and disruptive.

8. Defendant Beaston ordered Defendants Ross and Grace to move Plaintiff where he could no longer observe the search of his cell.

9. While he was being held against a wall, Plaintiff began struggling with Defendants Ross and Grace. Plaintiff kicked Defendant Grace in the leg.

10. Defendants then placed Plaintiff face-down on the floor. Defendant Sohnleitner retrieved leg irons from a location nearby, and shackled Plaintiff's legs.

11. Upon the completion of the cell search, Plaintiff was returned to his cell, where he was placed face-down on his bed and the leg irons were removed.

12. Later that day, Plaintiff was examined by a prison nurse, who noted no visible injuries.

13. Plaintiff was issued a misconduct report as a result of the October 7 incident, charging him with disobeying an

order and assault. Plaintiff pled guilty to disobeying an order. At a disciplinary hearing, Plaintiff was found not guilty of assault.

14. At no time did any of the Defendants strike or kick Plaintiff, throw Plaintiff to the floor, or choke him.

15. At no time did the force used by Defendants in restraining Plaintiff exceed that which was reasonable under the circumstances.

#### CONCLUSIONS OF LAW

1. We exercise jurisdiction according to 28 U.S.C. §§ 1331 & 1343.

2. Defendants did not violate Plaintiff's constitutional rights.

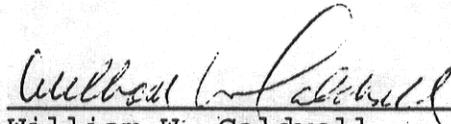
#### DISCUSSION

Plaintiff accuses Defendants of assaulting him during the October 7 cell search. Defendants deny that at any point any of them struck, choked, or kicked Plaintiff as he has alleged.

We find the testimony of Plaintiff and his inmate witness, who was nearby in a cell, to be lacking in credibility. This is particularly so given the absence of any credible evidence of injury as a result of the incident he describes.

We find the evidence of the Defendants, on the other hand, to be credible and consistent. We conclude, therefore, that

the force used by Defendants to restrain Plaintiff was reasonable under the circumstances. Defendants did not violate Plaintiff's civil rights, and judgment must therefore be entered in favor of Defendants and against Plaintiff.



William W. Caldwell  
United States District Judge

Date: August 6, 1997

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

PETER COOK,  
Plaintiff

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vs.

: CIVIL ACTION NO. 1:CV-95-1759

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VERDICT AND JUDGMENT

MARY E. MANDEA CLERK  
Per *g/g*

AND NOW, this 6th day of August, 1997, a verdict and judgment are entered in favor of the Defendants and against the Plaintiff. The Clerk of Court shall close this file.

*William W. Caldwell*

William W. Caldwell  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PETER COOK, : CIVIL ACTION NO. 1:CV-95-1759  
Plaintiff : (Judge Caldwell)  
v. : (Magistrate Judge Blewitt)  
TONY ROSS, et al., :  
Defendants :

FILED  
SCRANTON  
MAR 29 1996  
PER *JRB*  
DEPUTY CLERK

**REPORT AND RECOMMENDATION**

The Plaintiff, an inmate at the State Correctional Institution at Camp Hill ("SCI-Camp Hill"), filed this civil rights action pursuant to 42 U.S.C. § 1983 on October 19, 1995. (Doc. 1). He alleges that the Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment when they assaulted him during a cell search.

Named as Defendants are the following staff members of SCI-Camp Hill: Anthony Ross, Nathan Beaston, John Kelly, Kevin Grace, Charles Wylam, K. Kyler, William Ward, and Paul Leggore.<sup>1</sup>

Plaintiff is seeking injunctive relief, as well as compensatory and punitive damages.

**I. Pending Motions.**

On December 28, 1995, a motion to dismiss the Plaintiff's complaint pursuant to Fed.R.Civ.P. 12 (b) (6), along with a supporting brief, was filed on behalf of Defendants

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1. The Plaintiff also named Officer Jane Doe as a Defendant in his complaint. Officer Doe, who was subsequently identified by the Plaintiff as Officer Scholeitner, has not been served in this matter, nor has she waived service. Accordingly, this Report and Recommendation is not applicable to her.

Ross, Beaston, Leggore, Grace, Kelly, Wylam, Kyler, and Ward. (Docs. 12 and 13). The Plaintiff filed his brief in opposition to the motion on January 19, 1996. (Doc. 14). On March 21, 1996, Plaintiff filed a Motion for Leave to Amend Complaint (Doc. 30). Said motion will be denied and will be considered as further opposition to Defendants' motion to dismiss the complaint. The Motion to Dismiss is ripe for disposition.

## II. Discussion.

### A. Standards.

#### 1. *Motion to Dismiss Standard.*

The Defendants seek to dismiss the complaint on the ground that the complaint fails to state a claim upon which relief can be granted. When evaluating a motion to dismiss, 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).

#### 2. *42 U.S.C. § 1983 Standard.*

In order to state a 42 U.S.C. § 1983 claim, the plaintiff must show that the defendant acted under color of state law, that a federally secured right is implicated, and that the defendant deprived the plaintiff or caused the deprivation of that right. *Parratt v.*

*Taylor*, 451 U.S. 527, 535 (1981). Liability may therefore only be based upon a defendant's personal involvement in conduct amounting to a constitutional violation. *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976).

**B. Personal Involvement.**

As stated above, in order for the Plaintiff to state a claim under 42 U.S.C. § 1983, he must allege a defendant's personal involvement in conduct amounting to a constitutional violation.

The Plaintiff has alleged that he was assaulted by various staff members of SCI-Camp Hill during a cell search which occurred on October 7, 1995. However, the Plaintiff has failed to allege any personal involvement on behalf of Defendants Wylam or Leggore in the assault. The Plaintiff alleges that these Defendants conducted the search of his cell, and that Defendant Leggore had "trashed" his legal materials during the search, but nowhere does he allege that these Defendants either were personally involved in or acquiesced in the alleged assault upon him. As such, the motion to dismiss filed on behalf of these Defendants will be granted.

The Plaintiff has also failed to allege any personal involvement on behalf of Defendant Kyler. In his complaint, the Plaintiff alleges that he wrote to Defendant Kyler on several occasions to complain about the alleged assault upon him, but that he failed to take any action. It appears that the Plaintiff is trying to impose liability upon Defendant Kyler based upon his supervisory position. It is well established that liability may not be imposed under 42 U.S.C. § 1983 on the basis of *respondeat superior*. Therefore, it will be recommended that the motion to dismiss filed on behalf of Defendant Kyler be granted.

Lastly, the Plaintiff has failed to allege any personal involvement on behalf of Defendant Ward. The Plaintiff alleges that he also wrote to Defendant Ward to inform him of the alleged assault, but that he failed to take any action. As stated above, Defendant Ward cannot be held liable based upon his supervisory powers.

In addition to the above allegations, the Plaintiff claims that Defendant Ward should be held liable because he went to the Plaintiff's cell and verbally harassed him.<sup>2</sup> Even based upon these allegations, however, the Plaintiff has failed to state a claim against Defendant Ward under 42 U.S.C. § 1983. While the Eighth Amendment protects prisoners from cruel and unusual punishment, not all tortious conduct which occurs in prison rises to the level of a constitutional violation. See *Howell v. Cataldi*, 464 F.2d 272, 277 (3d Cir. 1972). It has further been held that the use of words, no matter how violent, cannot constitute an assault actionable under 42 U.S.C. § 1983. *Johnson v. Glick*, 481 F.2d 1018, 1033 n.7 (2d Cir. 1973). Therefore, it will be recommended that the motion to dismiss filed on behalf of Defendant Ward be granted.

### C. Eighth Amendment Claim.

The Plaintiff alleges that on October 7, 1995, he was handcuffed and taken out of his cell for a cell search. He further alleges that, during this time, he saw Defendant Leggore "trashing" his legal material. When the Plaintiff objected to Defendant Leggore's actions, he alleges that he was moved to the side wall where he was punched in the face by Officer Ross. He then claims that he was grabbed by the neck and flipped over Officer

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2. The Plaintiff alleges that Defendant Ward approached him and stated "You don't get enough do you Cook. Your lawsuits are going to end up getting you killed in here. They should have killed your nigger ass! That's what comes with complaints." (Doc. 1, ¶ 15).

Ross's back and slammed to the floor, where he was then placed in a choke hold. While being restrained on the floor by Officers Grace and Ross and Sergeant Kelly, the Plaintiff claims that he was repeatedly kicked by Officer Scholeitner. After his cell search was completed, the Plaintiff alleges that he was carried back into his cell, where he was again slapped in the face by Officer Ross. The Plaintiff alleges that during the time of this assault, Lieutenant Beaston was present, but failed to take any action.

Based upon the alleged facts above, the Plaintiff has stated a claim under the Eighth Amendment. As such, it will be recommended that the motion to dismiss filed on behalf of Defendants Ross, Beaston, Grace, and Kelly be denied.

#### **IV. Conclusion**

Based upon the foregoing, it is recommended that the motion to dismiss (Doc. 12) filed on behalf of Defendants Ross, Beaston, Leggore, Grace, Kelly, Wylam, Kyler, and Ward be granted in part and denied in part. With respect to Defendants Wylam, Leggore, Kyler, and Ward, it is recommended that the motion to dismiss be granted. With respect to Defendants Ross, Beaston, Grace, and Kelly, it is recommended that the motion to dismiss be denied. It is further recommended that the matter be remanded to the undersigned for further proceedings.



**THOMAS M. BLEWITT**  
**United States Magistrate Judge**

**Dated:** March 29, 1996

IN THE UNITED STATES DISTRICT COURT  
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PETER COOK,  
Plaintiff

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vs.

: CIVIL ACTION NO. 1:CV-95-1759  
(Judge Caldwell)

: (Magistrate Judge Blewitt)

TONY ROSS, et al.  
Defendants

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**FILED**  
HARRISBURG, PA

APR 22 1996

O R D E R

MARY E. D'ANDREA, CLERK  
Per *[Signature]* upon Deputy Clerk

AND NOW, this 22nd day of April, 1996

consideration of the Report of the United States Magistrate Judge, dated March 29, 1996, to which no exceptions have been filed, and upon independent review of the record, it is ordered that the Magistrate Judge's Report is adopted. It is further ordered, pursuant to the Magistrate Judge's recommendation, that:

1. Defendants' motion to dismiss is granted in part.
2. The complaint is dismissed as against Defendants Leggore, Wylam, Kyler, and Ward.
3. This action is remanded to the Magistrate Judge for further proceedings.

*William W. Caldwell*  
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William W. Caldwell  
United States District Judge