

MIGUEL JOSE GARCIA,
Plaintiff

v.

MARTIN HORN, KATHLEEN
ZWIERZYNA, ROBERT BITNER,
EDWARD BRENNAN, SHIRLEY
MOORE, RANDY NEISWONGER, and
KIM MILLER,
Defendants

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

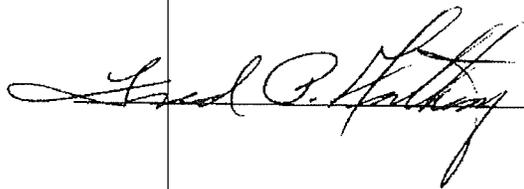
CIVIL ACTION - LAW

CASE NO. 14165 -1998

ORDER

AND NOW, to-wit, this 29 day of November, 1999, it is hereby ORDERED
and DECREED that Defendants' Preliminary Objections in the Nature of a Demurrer are
SUSTAINED and the case is DISMISSED.

BY THE COURT:



J.

C: Miguel Jose Garcia
Kemal A. Mericli, Esquire

Notice was given to each party or counsel of
record by ordinary mail on 11-30-99.

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Plaintiff

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OPINION

Anthony, J., November 29, 1999.

This matter comes before the Court on Defendants' preliminary objections to Plaintiff's Complaint. After a review of the pleadings and the briefs of the parties and considering the arguments of counsel, the Court will sustain the objections. The factual and procedural history is as follows.

Plaintiff is an inmate incarcerated at SCI Albion in Erie County, Pennsylvania. Defendants are all employees of the State Correctional System in some fashion. Defendants Neiswonger and Miller are correctional officers at SCI Albion. Defendant Moore is the Albion Prison Grievance Coordinator. Defendant Brennan is the Superintendent of SCI Albion and Defendant Bitner is the Department of Corrections Central Office Review Committee Hearing Examiner. Defendant Horn is the Department of Corrections Secretary and Defendant Zwierzyna is his Deputy Assistant.

Plaintiff filed suit on November 17, 1998 alleging that Defendants Neiswonger and Miller threatened Plaintiff and caused another corrections officer, Knepper, to seize "Plaintiff's personal

Amia-01-99
2/17/99

#26, 4 pages OPINION & ORDER dtd 11/29/99

legal research documents, which consisted of the Department of Corrections Code of Ethics." He appealed this seizure through the grievance and appeals process at SCI Albion thereby contacting all of the other named Defendants. The Plaintiff did not get his documents back through the review process. Plaintiff asserts in this lawsuit that all of the defendants violated his rights under Titles 42 Pa.C.S.A. §5101, 42 Pa.C.S.A. §8550 and 65 P.S. §66.1(2).

Defendants collectively filed their objections and a brief in support on February 26, 1999. Plaintiff responded on March 18, 1999.

Defendants contend that Plaintiff's action is barred by sovereign immunity. Plaintiff responds by arguing that the Preliminary Objections are untimely under Pa.R.C.P. §1026. Plaintiff further contends that 42 Pa.C.S.A. §8550 provides an exception to the doctrine of sovereign immunity that is applicable to the present case.

When addressing a demurrer, the Court must accept as true all well pled facts set forth in the complaint and give the plaintiff the benefit of all reasonable inferences from those facts. *Aetna Electroplating Co., Inc. v. Jenkins*, 484 A.2d 134 (Pa.Super. 1984). Further, the Court must overrule a demurrer unless it is certain that there is no set of facts under which the plaintiff could recover. *Bower v. Bower*, 611 A.2d 181 (Pa. 1992). Any doubt must be resolved in favor of overruling the demurrer. *Id. Moser v. Heistand*, 681 A.2d 1322 (Pa. 1996).

The Court will first address the timeliness of the objections. It is correct that the objections were not filed within the twenty days as required by Pa.R.C.P. §1026. However, Defendants did file a Motion for Extension of Time to file a Response. While

this was never actually ruled upon, the Court can see no reason why it would not have been granted. Furthermore, Pa.R.C.P. §1026 is a permissive not a mandatory rule and the Court can allow the pleading if it will not prejudice the other party and justice requires it. *Weaver v. Martin*, 655 A.2d 180, 183 (Pa.Super. 1995). Thus, the Court will excuse the late filing and rule on the merits of the objections.

State officials are entitled to sovereign and official immunity from suit when they are acting within the scope of their duties unless the General Assembly has specifically waived that right. Pa. Const., Art I, §11; 1 Pa.C.S.A. §2310. There are only nine exceptions to sovereign immunity for state employees and those are enunciated in 42 Pa.C.S.A. §8522(b). Those exceptions must be narrowly construed. *Warnecki v. Southeastern Pennsylvania Transportation Authority*, 689 A.2d 1023, 1025 (Pa.Cmwlth. 1997). Plaintiff's claim is not covered by any of those exceptions.

Plaintiff contends, however, that the exception for willful misconduct embodied in 42 Pa.C.S.A. §8550 applies to the present situation. Section 8550, though, only applies to local agencies or employees as is clear from the language. SCI Albion is a state institution and its officers and personnel are state employees. Thus, 42 Pa.C.S.A. §8550 is simply not applicable to the present situation.

In conclusion, since there is no exception under 42 Pa.C.S.A. §8522(b) that covers the case at issue, the objections will be sustained and the case will be dismissed.

 J.