

Salater

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION--LAW

GEORGE JONES,)
)
 Plaintiff,)

v.)

No. 98-1945

TOM PETERMAN, JEFFERY SMITH,)
 JAY STIDD, R. NORRIS, TERRY)
 WHITMAN, ROBERT MEYERS, AND)
 GREGORY GAERTNER,)
 Defendants.)

Each Defendant is sued both individually,)
 in their personal capacity and in their)
 official capacities.)

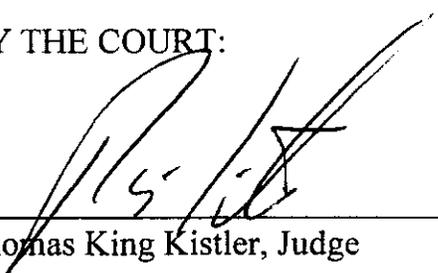
JURY TRIAL DEMANDED

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ORDER

AND NOW, this 11th day of September, 2000, it is the **ORDER** of this Court that the Plaintiff, George Jones, shall file a statement of matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), so as to provide this Court with guidance for the filing of any necessary Opinions.

BY THE COURT:



Thomas King Kistler, Judge

Jalaber

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CENTRE COUNTY, PA

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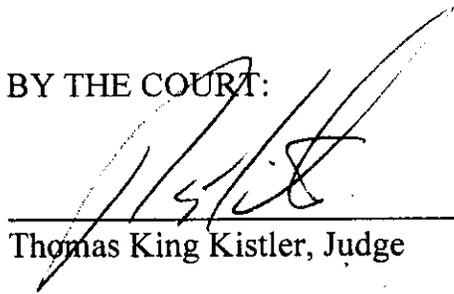
Each Defendant is sued both individually,)
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JURY TRIAL DEMANDED

ORDER

AND NOW, this 29th day of August, 2000, upon consideration of the Motion for Leave to File and Proceed in Forma Pauperis filed by the Plaintiff, George Jones, on August 17, 2000. in the above-captioned case, said Petition is **GRANTED**.

BY THE COURT:



Thomas King Kistler, Judge

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CIVIL ACTION - LAW

GEORGE JONES,)
Plaintiff,)
v.)
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GAERTNER,)
Defendants.)

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Attorney for Plaintiff:
Attorney for Defendants:

Pro Se
John J. Talaber, Esquire

OPINION AND ORDER

KISTLER, J.

Presently before the Court for consideration is Defendants' Preliminary Objection in the nature of a Demurrer.

FACTUAL BACKGROUND

1. Plaintiff George Jones (hereinafter "Plaintiff") is an inmate currently confined in the State Correctional Institution at Frackville (hereinafter "SCI-Frackville").
2. Defendants are employees or were employees at the State Correctional Institution at Rockview (hereinafter "SCI-Rockview") in 1996.
3. Plaintiff's Complaint arises out of an incident in which Plaintiff was transferred from SCI-Rockview to SCI-Frackville.
4. Plaintiff initiated said Complaint as a 42 U.S.C. §1983 action with claims of due process violations, retaliation, and denial of access to courts.

5. Plaintiff's Complaint alleges, *inter alia*, that Defendants conspired to remove Plaintiff from an anti-crime organization Plaintiff was forming, and in the process denied Plaintiff access to various legal materials.

PROCEDURAL BACKGROUND

1. On July 22, 1998, Plaintiff filed a Complaint with the Court of Common Pleas of Centre County.

2. On September 1, 1998, this Court determined that original jurisdiction rested within the Commonwealth Court of Pennsylvania, and returned Plaintiff's Complaint.

3. On December 23, 1999, the Commonwealth Court found that it did not have original jurisdiction over Plaintiff's Complaint, and remanded it to the Court of Common Pleas of Centre County.

4. On April 17, 2000, Defendant's filed the instant Preliminary Objection in the Nature of a Demurrer.

5. As Defendants have filed a brief on this matter and the date for a responsive brief from Plaintiff has passed without any brief being filed, this matter is ripe for disposition.

CONCLUSIONS OF LAW

1. In considering preliminary objections in the nature of a demurrer, the complaint must be examined to determine whether it sets forth a cause of action which, if proved, would entitle the party to the relief sought; if such is the case, the demurrer may not be sustained, but if the complaint fails to set forth a cause of action, preliminary objections in

the nature of a demurrer are properly sustained. Doe v. Dyer-Goode, 389 Pa. Super. 151, 154, 566 A.2d 889, 890 (1989) citing Rose v. Wissinger, 294 Pa. Super. 265, 439 A.2d 1193 (1982).

2. In reviewing a demurrer, all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Fewell v. Besner, 444 Pa. Super. 559, 563, 664 A.2d 577, 579 (1995) (*citations omitted*).

3. "A demurrer may only be sustained when on the face of the complaint the law will not permit recovery." Doxsey v. Commonwealth, 2000 Pa. Commw. LEXIS 151, 674 A.2d 1173, 1174 (1996).

4. "No inmate shall have a right to be housed in a particular institution or in a particular area within an institution." 37 Pa. Code § 93.11(a).

DISCUSSION

Defendants have filed the instant Preliminary Objection in the Nature of a Demurrer, averring Plaintiff's entire Complaint should be dismissed. Specifically, Defendants contend Plaintiff has failed to state a claim sufficient to constitute a violation of Plaintiff's United States Constitutional rights as applied to his contentions of lack of due process, retaliation, and denial of access to the legal system.

At the outset, this Court notes that Plaintiff did not provide a brief on the instant Preliminary Objection.

I. Due Process

Defendants aver that Plaintiff was provided due process regarding his misconducts and, therefore, Plaintiff's Complaint fails to state a claim upon which relief can be granted.

This Court agrees.

Plaintiff was provided a disciplinary hearing and an appeal of that hearing, as warranted by the due process requirement of the Fourteenth Amendment to the United States Constitution. See, Wolff v. McDonnell, 418 U.S. 539, 41 L.Ed 2d 935, 94 S.Ct. 2963 (1974).

While Plaintiff avers that the charges against him were false, Plaintiff fails to assert a protected interest for which he has been deprived. Plaintiff has no protected interest in being housed at a particular state correctional institution, nor does Plaintiff have a protected interest in being housed in the general prison population at a specific correctional institution. 37 Pa. Code § 93.11(a); See generally, Sandin v. Conner, 515 U.S. 472, 132 L.Ed 2d 418, 115 S.Ct. 2293, 2300 (1995).

As Plaintiff has failed to adequately assert a protected interest and was provided due process, Plaintiff's claims cannot be sustained.

II. Retaliation

Defendants contend Plaintiff failed to raise a legally cognizable claim for retaliation. This Court agrees.

In order to state a claim for retaliation, Plaintiff must show: an underlying constitutional right; intent by a defendant to retaliate against the inmate for exercising that right; and causation. Johnson v. Rodriguez, 110 F.3d 299 (5th Cir.) *cert denied*, 118 S.Ct.

559 (1997). Initially, Plaintiff's Complaint fails to allege or demonstrate a protected Constitutional right.

Even if this Court were to determine that Plaintiff's Complaint raises issues which give rise to a First Amendment claim, Plaintiff's retaliation claim still fails in that Plaintiff has failed to sufficiently allege an intent on Defendants' part to retaliate. An inmate's allegations of retaliation are prone to abuse and this Court finds that Plaintiff has not averred any causal nexus between the disciplinary action taken for inmate misconduct, and any type of retaliation for Plaintiff's activities which may fall under the protection of the First Amendment. Id.

III. Denial of Access to Court

Defendants contend that Plaintiff cannot recover for the alleged denial of access to the courts because Plaintiff has failed to show that he suffered an actual injury to a legal action. Lewis v. Casey, 518 U.S. 343, 351, 135 L.Ed 2d 606, 116 S.Ct. 2174 (1996). This Court agrees.

A matter similar to the instant action was ruled upon in Robinson v. Ridge, 996 F.Supp. 447 (E.D.Pa.1997), aff'd, 175 F.3d 1011 (3d Cir.1999). In Robinson, the Court reasoned:

"Robinson claims that the searchers confiscated notes of testimony, legal briefs, letters to his attorney, correspondence with the courts, a Black's Law Dictionary, and Rules of Court books. (Complaint ¶ 43). Although denial of access to legal documents may constitute a violation of a prisoner's First Amendment right to petition the courts and/or Fourteenth Amendment due process rights, Zilich v. Lucht, 981 F.2d 694, 695 (3d Cir.1992), in order to state a cognizable claim for violation of the right to access to the courts, a prisoner must allege and offer proof that he suffered an "actual injury" to court access as a result of the denial. Oliver v. Fauver, 118 F.3d 175, 177-78 (3d Cir.1997). The Supreme Court has defined actual

injury as the loss or rejection of a nonfrivolous legal claim regarding the sentencing or the conditions of confinement. Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 2179-82, 135 L.Ed.2d 606 (1996). Robinson alleged at oral argument that the deprivation of his legal documents has made it impossible for him to appeal his conviction. Robinson's access to courts claim must fail because he has not alleged the requisite actual injury from the loss of his legal documents. "

Id. at 449.

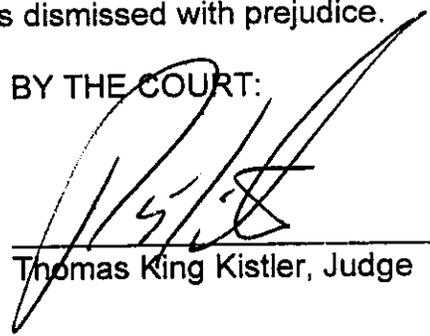
As Plaintiff has not alleged any actual injury arising from the claim that Defendants denied his legal property for "over sixty days on two separate occasions," Plaintiffs cannot sustain this cause of action.

ORDER

AND NOW, this 20th day of July, 2000, upon consideration of Defendants' Preliminary Objection in the Nature of a Demurrer, it is the ORDER of this Court that said Preliminary Objection is hereby **SUSTAINED**.

The Complaint against the Defendants is dismissed with prejudice.

BY THE COURT:



Thomas King Kistler, Judge

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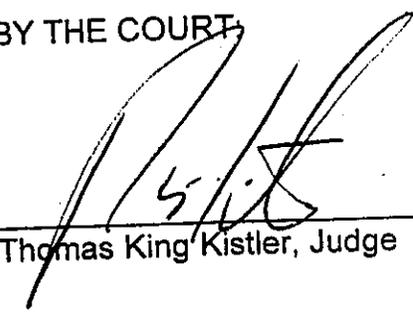
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ORDER

AND NOW, this 26th day of May, 2000, after having reviewed Plaintiff George Jones's Request for Judicial Notice dated May 17, 2000, it is the ORDER of this Court that, pursuant to the Pennsylvania Rules of Evidence Rule 201, said Request is hereby **DENIED.**

The parties should endeavor to reach stipulations as to material factual averments which are not in dispute.

BY THE COURT,


Thomas King Kistler, Judge

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