

KEITH BARTELLI,

:

Plaintiff

CIVIL NO. 3:CV-04-0903

-vs-

(Judge Kosik)

THOMAS STACHELEK,

Defendant :

ORDER

AND NOW, this 29th day of October, 2004, IT IS HEREBY ORDERED THAT:

(1) The Report and Recommendation of the Magistrate Judge dated June 3, 2004 (Document 7), is **ADOPTED**;

(2) The plaintiff's request to file an amended complaint is **DENIED**;

(3) The above-captioned action is **DISMISSED** for failure to state a claim pursuant to 28 U.S.C. §1915(e)(2)(B)(ii); and,

(4) 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

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

KEITH BARTELLI,

Plaintiff

-vs-

CIVIL NO. 3:CV-04-0903

(Judge Kosik)

THOMAS STACHELEK,

Defendant :

MEMORANDUM

_____ Before the court are plaintiff's objections to the Report and Recommendation of Magistrate Judge Thomas M. Blewitt dated June 3, 2004. For the reasons which follow, we will adopt the Report and Recommendation of the Magistrate Judge.

Background

_____ Plaintiff, Keith Bartelli, an inmate at the State Correctional Institution at Dallas filed the instant civil rights action pursuant to 42 U.S.C. §1983 on April 26, 2004. In his complaint, plaintiff names as the sole defendant, Thomas Stachelek, former Deputy Superintendent at SCI-Dallas. Plaintiff seeks declaratory and injunctive relief and compensatory and punitive damages.

On June 3, 2004, the Magistrate Judge issued a Report and Recommendation in which he recommended that the plaintiff's first claim be dismissed as time-barred and that defendant Stachelek be dismissed for failure to state a claim against him pursuant to 28 U.S.C. §1915 (e)(2)(B)(ii). On June 17, 2004, plaintiff filed objections to the Report and Recommendation of the Magistrate Judge. Plaintiff filed a second objection to the Magistrate Judge's Report and Recommendation on August 17, 2004. In his objections, plaintiff argues that the first claim was not time-barred. Plaintiff also argues that he can establish a conspiracy against the defendant and seeks to amend his complaint.

Discussion

When objections are filed to a Report and Recommendation of a Magistrate Judge, we must make a *de novo* determination of those portions of the Report to which objections are made. 28 U.S.C. §636(b)(1)(C); *see Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In doing so, we may accept, reject or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. §636(b)(1); Local Rule 72.3. Although our review is *de novo*, we are permitted by statute to rely upon the Magistrate Judge's proposed recommendations to the extent we, in the exercise of sound discretion, deem proper. *United States v. Raddatz*, 447 U.S. 667, 676 (1980); *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984).

As the Magistrate Judge indicates, plaintiff's complaint against defendant Stachelek consists of two allegations. Specifically, the complaint states:

1. Beginning in April of 2001, defendant as a DOC policy enforcer ignored plaintiff's complaints, appeals, and request slips. Thus hindering and denying plaintiff's due process rights and equal protection rights afforded plaintiff by the Constitution.
2. As a superior he had a duty to protect plaintiff from any and all illegal acts by his subordinates once he became aware of such actions. His non-action to prevent such violations of DOC policies, constitutional and civil rights meant he conspired and condoned the activities of subordinates.

In the Report and Recommendation, the Magistrate Judge recommends that the instant action be dismissed on three grounds: (1) that the plaintiff's first claim is time barred by the two-year statute of limitations; (2) that the allegations in the second claim refer to unspecified acts of defendant's subordinates and does not allege any personal involvement by the defendant, thus there is no basis for liability under the doctrine of *respondeat superior*, and (3) that there is no constitutional right to a grievance procedure and plaintiff's allegation that defendant ignored his complaints, appeals and request slips does not state a constitutional violation.

In his objections, plaintiff argues that the action is not time barred and that he should be allowed to amend his complaint to allege a conspiracy. While we find that it is premature to address the statute of limitations issue at this time in that we find the statute of limitations to be an affirmative defense which must be raised by the defendant, see, Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002), we consider the issue moot because we agree with the Magistrate Judge that plaintiff's two claims fail to state cognizable §1983 claims against the defendant.

As the Magistrate Judge points out, 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. Because plaintiff fails to allege any personal involvement by defendant in conduct amounting to a constitutional violation, we agree with the Magistrate Judge that plaintiff's second claim should be dismissed.

In addition, we agree with the Magistrate Judge that plaintiff's claims that defendant ignored his complaints, appeals and request slips, fails to state a claim. Plaintiff has no constitutional right to a grievance procedure. Moreover, the conduct complained of by plaintiff in claim one does not arise to the level of a constitutional violation.

While plaintiff requests an opportunity to file an amended complaint, we will deny his request. As the Magistrate Judge points out, plaintiff has already been allowed to amend his complaint once and he has several cases pending before this court. Moreover, prior to filing this action, plaintiff was fully advised by the court of the requirements for filing a civil rights action under §1983. Additionally, while plaintiff requests the opportunity to amend to raise a conspiracy claim, we note that the instant action has only one defendant. Accordingly, we will adopt the Report and Recommendation of the Magistrate Judge.