UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

MARCEL COOK,	:	
Plaintiff	:	
v.	:	CIVIL NO. 3:CV-10-1725
RAYMOND LAWLER, et al.,	:	(Judge Kosik)
Defendants	:	

MEMORANDUM

Marcel Cook ("Cook") is an inmate confined at the State Correctional Institution at Huntingdon, Pennsylvania. He filed this civil rights action pursuant to 42 U.S.C. § 1983 against the following eleven (11) SCI-Huntingdon employees: R. M. Lawler, Warden; J. Eckard and B. Corbin, Deputy Superintendents; Major C. Wakefield; Lieutenant B. Harris, Security Captain, Hearing Examiner C. Mitchell; Unit Manager Swartz; Counselor Lovett; and Correctional Officers Henry, Casner and Wertz. Pending is Defendants' motion to dismiss the complaint. (Doc. 18.) The motion is fully briefed and ripe for disposition. For the reasons that follow, the motion will be granted.

I. Allegations in the Complaint

Cook alleges that soon after his arrival at SCI-Huntingdon, Defendant Henry, a female correctional officer, began to refer to him as a pervert and a stalker. He believes this is because he told another inmate about "sex activities" Henry had with an officer at Cook's former place of confinement, and the inmate relayed this information to Henry. Cook states that he likes to talk to the female officers at SCI-Huntingdon, but alleges that Henry has "conspired" with them with "intentions to set-up plaintiff in retaliation." (Doc. 1, Compl. at 7.) He states that Henry conspired with Defendants Swartz and Lovett to suppress his First Amendment right to free speech. Cook maintains that he was later told by Swartz and Lovett not to look at or speak to any of the female staff members.

Cook states that on or about February 13, 2010, Officer Dicks (not named as a Defendant in this matter) walked by his cell while he was washing the upper portion of his body, and that his cell had no privacy curtain at the time. Cook believes that Dicks tried to lie to say he was naked and exposed himself to her. Although Cook was questioned about this incident, no incident report was issued. He states, however, that following this incident Defendant Henry subjected him to verbal abuse every time she worked on Cook's cell block by calling him a pervert and telling him she was going to "get his pervert ass." (Id. at 8-9.)

On April 31, 2010, Cook states that he was issued a bogus misconduct charge

while attempting to use the telephone.[1] The report was issued by Defendant Wertz on charges of Harassment, Harassment and Stalking, Refusing to Obey an Order, Unauthorized Use of the Phone, and Presence in an Unauthorized Area. (Id., Unnumbered Ex. 1, Misconduct Report B168361.) In the report, Cook was alleged to have feigned using the phone in order to stare at female staff members at a time that they would normally be walking by the desk area. Id. Cook alleges that Henry forced Defendant Wertz to issue the false misconduct, and claims that Defendant Casner conspired by being a witness. Defendant Harris is accused of failing to properly investigate the matter and "rubberstamping" the misconduct. (Doc. 1 at 10.)

A misconduct hearing was held before Defendant Mitchell, the Hearing Examiner. Cook contends that Mitchell denied him due process in accordance with the "Wolff" standards. He claims that Mitchell acted in an "arbitrary and partial manner" merely because he had been kidnapped and tortured during the SCI-Camp Hill 1989 riot. (Id.) Cook further alleges that the PRC conspired when they upheld the charges and only slightly reduced the sanction imposed against him. Cook also

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[1] Clearly Cook is mistaken with respect to the date of the incident in that there are only thirty (30) days in April. He attaches a copy of the misconduct report to the complaint, and it reveals that the report was issued on April 30, 2010. Also attached to the complaint is the Disciplinary Hearing Report, Cook's Misconduct Hearing Appeal, the PRC appeal decision, the Superintendent's appeal decision, a copy of Cook's Final Appeal, the Central Office's response thereto, and the Superintendent's denial of Cook's motion for further reduction of his sanction. (Doc. 1, Compl. at unnumbered pages 15-31.)

claims that Superintendent Lawler was deliberately indifferent to his well-being when he failed to correct these errors, and claims he should have known that the misconduct report was false. According to Cook, the Central Office acknowledged all of this injustice when they overturned portions of the reporting officer's report, but he contends he has still suffered pain and injustice.

Based on the foregoing, Cook claims his rights under the First Amendment were violated when Defendant Henry retaliated against him for exercising his right to free speech by telling others about her sexual history. He further maintains that Defendants Swartz and Lovett retaliated and conspired to prevent him from speaking to female staff members. He claims that Defendants Wertz and Casner conspired to issue a false misconduct report against him, and believes this was to further the wishes of Defendant Henry. Cook seeks to impose liability under the Due Process Clause on Defendants Harris and Mitchell with respect to the investigation of the misconduct and the hearing. He claims that Lawler and the PRC are responsible for the above violations because, as supervisors, they should have known of any injustice. Cook seeks monetary damages, the restoration of his custody level and privileges, and a transfer to SCI-Pittsburgh or SCI-Greensburg.

II. Motion to Dismiss Standard

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. Under Fed. R. Civ. P. 12(b)(6), the court must accept

as true the factual allegations in the complaint, and construe any inferences to be drawn from the allegations in plaintiff's favor. See Kanter v. Barella, 489 F.3d 170, 177 (3d Cir. 2007)(quoting Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005)). "The assumption of truth does not apply, however, to legal conclusions couched as factual allegations or to '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" Marangos v. Swett, No. 08-4146, 2009 WL 1803264 (3d Cir. June 25, 2009)(citing Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949-50 (2009). In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain enough "facts to state a claim to relief that is plausible on its face" Iqbal, 129 S. Ct. at 1949 (quoting Bell Atlantic Corp. v. Twombly , 550 U.S. 544, 570 (2007), and the factual allegations "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (internal citations omitted); accord Iqbal, 129 S. Ct. at 1953. The facts plead must offer more "than an unadorned, the defendant-unlawfully-harmed-me accusation." Id., 120 S. Ct. at 1949 (internal quotations and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct at 1949 (citing Twombly, 550 U.S. at 556). Further, a district court should provide leave to amend "when amendment could cure the deficiency and would not be inequitable." Grayson v. Mayview State Hospital, 293 F.3d 103, 106 (3d Cir.

2002). A complaint that does not establish entitlement to relief under any reasonable interpretation is properly dismissed without leave to amend. Id. at 106.

III. Discussion

A. Verbal Harassment

Claims of verbal abuse or harassment, without more, do not rise to the level of § 1983 violations. Mimms v. UNICOR, No. 10-1809, 2010 WL 2747470, at *2 (3d Cir. 2010)(per curiam). This is so even where the harassment involves threats of violence. See Herder v. Biesh, No. 09-2470, 2010 WL 2766611, at *4 (M.D. Pa. July 13, 2010)(Caldwell, J.); Maclean v. Secor, 876 F. Supp. 695, 698-99 (E.D. Pa. 1995)(collecting cases). Even racial slurs, while offensive, do not rise to the level of a constitutional violation. For these reasons, to the extent Cook raises claims of verbal harassment, they will be dismissed without leave to amend.

B. Issuance of False Misconduct Report

A false misconduct charge does not itself qualify as an Eighth Amendment violation. Booth v. Pence, 354 F. Supp. 2d 553, 558-59 (E.D. Pa. 2005)(citing Griffin v. Vaughn, 112 F.3d 703, 709 (3d Cir. 1997)). Similarly, no due process claim is stated when a prisoner alleges that misconduct charges were fabricated. Smith v. Messinger, 293 F.3d 641, 653-54 (3d Cir. 2002)(due process is satisfied where an inmate is afforded an opportunity to be heard and to defend against the allegedly falsified evidence and groundless misconduct reports). As such, Cook's claim of the

issuance of a false misconduct report is dismissed without leave to amend.

C. Retaliation

Retaliation for expressive activities can infringe upon an individual's rights under the First Amendment. See Allah v. Seiverling, 229 F.3d 220, 224-25 (3d Cir. 2000). To prevail on a retaliation claim under 42 U.S.C. § 1983, plaintiff must demonstrate (1) that he was engaged in protected activity; (2) that he suffered an "adverse action" by government officials that is sufficient to deter a person of ordinary firmness from exercising the protected activity; and (3) that there is "a causal link between the exercise of his constitutional rights and the adverse action taken against him." Rauser v. Horn, 241 F.3d 330 (3d Cir. 2001)(quoting Allah, 229 F.3d at 225). This third element uses a burden-shifting framework. The inmate bears the initial burden of proving that his constitutionally protected conduct was a substantial motivating factor in the decision to retaliate against him. Rauser at 333-34. A plaintiff must come forward with more than "general attacks" upon the defendant's motivations, and must produce "affirmative evidence" of retaliation from which a jury could find that the plaintiff had carried his burden of proving the requisite motive. Crawford-El v. Britton, 523 U.S. 574, 600 (1998). Once the prisoner meets this burden, the burden then shifts to the defendant to prove by a preponderance of the evidence that he would have taken the same action even in the absence of the protected activity. Rauser, 241 F.3d at 334. Thus "prison officials may still prevail

by proving that they would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." Rauser, 241 F.3d at 334; see also Carter v. McGrady, 292 F.3d 152, 158 (3d Cir. 2002)(retaliation claim not stated where preponderance of the evidence shows that defendants would have taken the same action for reasons reasonably related to penological interest).

In considering the third element, the court must take into account that the difficult task of prison administration is best left to prison officials who possess the necessary expertise. Rauser, 241 F.3d at 334 (citing Turner v. Safley, 482 U.S. 78, 89 (1987). Even if an inmate can demonstrate that the exercise of his constitutional rights was a substantial or motivating factor in the decision to discipline him, so long as a prison official can prove that absent the protected conduct he would have made the same decision for reasons reasonably related to a legitimate penological interest, he will prevail on a claim of retaliation. Id.

In the instant case, Cook fails to state a claim for retaliation in that he does not identify any constitutionally protected conduct as required by the first prong of the Rauser test. Cook states that he suffered retaliation from Henry due to his "right to Freedom of Speech and the right to know and freedom of information concerning her [Henry's] history here at SCI-Huntingdon." (Doc. 1, Compl ¶ 47.) In essence, he attempts to assert a First Amendment right to discuss Henry's sexual history with other inmates. (See id. ¶¶ 15-17.)

As a general rule, prisoners retain their First Amendment rights while in prison. See Beard v. Banks, 548 U.S. 521, 542 (2006)("[I]t is well settled that even the 'worst of the worst' prisoners retain constitutional protection, specifically including their First Amendment rights"). These rights are retained, however, only to the extent they are not inconsistent with the inmate's status or with the legitimate penological objectives of the corrections system. Pell v. Procunier, 417 U.S. 817, 822 (1974). "Free speech is not absolute at all times and under all circumstances." Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-72 (1942).

In order to receive First Amendment protection, an inmate's speech must relate to a matter of public concern. Williams v. Klem, No. 3:CV-07-1044, 2008 WL 4453100, *4 (M.D. Pa. Sept. 30, 2008)(Vanaskie, J.)(citing Bartnicki v. Vopper, 532 U.S. 514, 533-34 (2001). In the instant case, Cook's comments to another inmate with respect to Defendant Henry's sexual history is not of public concern and not entitled to First Amendment protection. As such, he fails to meet prong one of Rauser with respect to this claim.

Cook further appears to allege that his First Amendment rights were violated when Defendants Swartz and Lovett instructed him not to look at or speak to female staff members at SCI-Huntingdon. Again, Cook fails to allege constitutionally protected activity for purposes of stating a retaliation claim. The Misconduct attached by Cook to the complaint documents a history of inappropriate behavior

toward female staff, and Defendants Swartz and Lovett gave him a direct order to stop this behavior on April 8, 2010.[2] Any contention by Cook that his stares and overtures toward female staff members is protected conduct in prison is without merit in that it does not amount to speech involving matters of public concern. Any such behavior could clearly be interpreted to potentially create a disturbance within the prison inciting further problems. For all of the above reasons, the court finds that Cook's claims of retaliation are subject to dismissal in that he fails to allege he was involved in constitutionally protected conduct.

D. Procedural Due Process

Cook also alleges that Defendants denied him procedural due process with respect to his misconduct proceedings. The Due Process Clause offers procedural and substantive protections against deprivations of "life, liberty, or property." U.S. CONST. Amend. XIV, §1. In order to determine whether a due process violation has occurred, an initial determination must be made that a protected liberty interest exists, and if so, the next step is to define what process is mandated to protect it. Shoats v. Horn, 213 F.3d 140, 143 (3d Cir. 2000). Prison conditions do not impact a protected liberty interest unless the prison's action imposes "an atypical and significant

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[2] In fact, in his brief in opposition to the motion to dismiss Cook admits that prior to the misconduct in issue, he received similar misconducts at three (3) of his prior places of incarceration: SCI-Houtzdale, SCI-Forrest and SCI-Dallas. (Doc. No. 24 at 2.)

hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 483 (1995). "The determination of what is 'atypical and significant' is based upon the range of conditions an inmate would reasonably expect to encounter." McKeithan v. Jones, 212 Fed. App'x. 129, 130 (3d Cir. 2007)(citing Asquith v. Dep't of Corrections, 186 F.3d 407, 412 (3d Cir. 1999); Griffin v. Vaughn, 112 F.3d 703, 706 & n. 2 (3d Cir. 1997)). In deciding whether a protected liberty interest exists under Sandin, a federal court also considers the duration of the disciplinary confinement and the condition of that confinement in relation to other prison conditions. Mitchell v. Horn, 317 F.3d 523, 532 (3d Cir. 2003)(citing Shoats, 213 F.3d at 144).

In the instant case, following his initial finding of guilt and the subsequent appeals, Plaintiff's sanction resulted in a total of 90 days of disciplinary confinement. The Third Circuit Court of Appeals has held that where an inmate failed to allege that he was subjected to atypical conditions during his 930 day sentence to disciplinary confinement, he failed to show a deprivation of a cognizable liberty interest under Sandin. Young v. Beard, 227 Fed. App'x. 138, 2007 WL 824172 (3d Cir. 2007). If a sentence of 930 days does not implicate a liberty interest, then certainly Plaintiff's ninety (90) day sanction, without any allegations of atypical or significantly harsh conditions of that confinement in relation to other prison conditions, does not

implicate a liberty interest.[3] As such, Plaintiff has failed to demonstrate that he was entitled to due process protections with regard to his disciplinary confinement, and Defendants' motion to dismiss will be granted with respect to the due process claims.

Even if Cook had established the existence of a liberty interest, the allegations in the complaint fail to state a due process claim. Cook does not allege in the complaint that he did not receive advance written notice of the charges, did not have an opportunity to present a defense or did not receive a written statement from the hearing examiner setting forth the evidence relied on and the reasons for the disciplinary action taken. To the contrary, in the documents attached by Cook to the complaint, it is clear that he received all of the procedural requirements under Wolff v. McDonnell, 418 U.S. 539 (1974), and that the Hearing Examiner's decision was supported by "some evidence." Even though the sanction was later reduced, and some of the charges dismissed, Cook was still found to have committed some of the

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[3] No allegations are contained in the complaint challenging any conditions of Cook's disciplinary confinement. In his opposition brief, however, Cook appears to attempt to now challenge those conditions. (Doc. 24 at 7.) It is well-settled that courts need not consider the additional claims raised in an opposition brief and not pleaded in the complaint. See Aldinger v. Spectrum Control, Inc., 207 Fed. App'x 177, 180 n. 1 (3d Cir. 2006); Grayson v. Mayview State Hospital, 293 F.3d 103, 109 n. 9 (3d Cir. 2002)(noting that "prisoner plaintiff (or any other plaintiff) should not be able to effectively amend a complaint through any document short of an amended pleading"). Further, there is no point in permitting amendment to set forth such allegations in that those conditions alleged - - cold food, no hot water, restrictions on the use of the law library "and other harassing punishment"-- are conditions that one would expect to experience in prison, and do not amount to atypical and significant.

charged actions and was sanctioned to 90 days disciplinary confinement.

In addition, it is clear that the claims raised against Superintendent Lawler and the PRC are based upon their review of Cook's misconduct appeals. It is well-established that ". . . inmates do not have a constitutionally protected right to a prison grievance system." Mitchell, 696 F. Supp. 2d at 469. Thus, an unfavorable response to a grievance does not amount to a violation of a prisoner's constitutional rights. Id. If an official's only involvement is investigating and/or ruling on an inmate's grievance after the incident giving rise to the grievance has already occurred, there is no personal involvement on the part of that official. Rode, 845 F.3d at 1208; Brooks v. Beard, 167 F. App'x 923, 925 (3d Cir. 2006).

E. Conspiracy

To set forth a cognizable conspiracy claim, a plaintiff cannot rely on broad or conclusory allegations. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1377 (3d Cir. 1992); Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989). The Third Circuit has noted that a civil rights conspiracy claim is sufficiently alleged if the complaint details the following: (1) the conduct that violated the plaintiff's rights, (2) the time and the place of the conduct, and (3) the identity of the officials responsible for the conduct. Oatess v. Sobolevitch, 914 F.2d 428, 432 n. 8 (3d Cir. 1990); see also Colburn v. Upper Darby Twp., 838 F.2d 663 (3d Cir. 1988).

The essence of a conspiracy is an agreement or concerted action between

individuals. See D.R. v. L.R., 972 F.2d at 1377; Durre, 869 F.2d at 545. A plaintiff must therefore allege with particularity and present material facts which show that the purported conspirators reached some understanding or agreement or plotted, planned and conspired together to deprive plaintiff of a protected federal right. See id.; Rose, 871 F.2d at 366. Where a civil rights conspiracy is alleged, there must be specific facts in the complaint which tend to show a meeting of the minds and some type of concerted activity. Deck v. Leftridge, 771 F.2d 1168, 1170 (8th Cir. 1985). A plaintiff cannot rely on subjective suspicions and unsupported speculation. Young v. Kahn, 926 F.2d 1396, 1405 n. 16.

Viewing the complaint in the light most favorable to Plaintiff, he fails to state a viable conspiracy claim against Defendants. His allegations of a conspiracy merely because some of the Defendants' names appear in the Misconduct Report are conclusory, and fail in any respect to meet the requirement that a civil rights conspiracy claim contain specific facts that tend to show a meeting of the minds and concerted activity. The same holds true with respect to his allegations that Defendant Harris engaged in "rubberstamping" the misconduct charge against him, and that the PRC and Superintendent were somehow involved in a conspiracy because they upheld the charges. Cook's brief in opposition to Defendants' motion to dismiss is full of references to alleged existence of "the good ole boys" reputation at the prison. These allegations, however, are made without any factual support. For all of the

above reasons, the motion to dismiss filed by Defendants will be granted. An appropriate order is attached.

UNITED STATES DISTRICT COURT
FOR THE
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MARCEL COOK,	:	
Plaintiff	:	
v.	:	CIVIL NO. 3:CV-10-1725
RAYMOND LAWLER, et al.,	:	(Judge Kosik)
Defendants	:	

ORDER

NOW, THIS 25th **DAY OF APRIL, 2011,** in accordance with the accompanying Memorandum, **IT IS HEREBY ORDERED AS FOLLOWS:**

1. Defendants' motion to dismiss (Doc. 18) is **granted** in its entirety. The **complaint is dismissed** with respect to all Defendants.

2. The Clerk of Court is directed to **close this case**.

3. Any appeal from this order will be deemed frivolous, without probable cause and not taken in good faith.

EDWIN M. KOSIK
United States District Judge