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

PETER COOK, :
Plaintiff
:
vs. : CIVIL ACTION NO. 1:CV-95-369
(Judge Caldwell)
: (Magistrate Judge Blewitt)
LT. ROSENBURGER, et al., :
Defendants

O R D E R

AND NOW, this 13th day of September, 1995, upon consideration of the Report of the United States Magistrate Judge, dated August 16, 1995, 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 Defendants' motion to dismiss is granted and the Clerk of Court shall close the file.

William W. Caldwell
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

Re: 1:95-cv-00369 Cook v. Rosenburger

True and correct copies of the attached were mailed by the clerk to the following:

Peter Cook
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cc:

Judge	(✓)	
Magistrate Judge	(✓)	
U.S. Marshal	( )	
Probation	( )	
U.S. Attorney	( )	
Atty. for Deft.	( )	
Defendant	( )	
Warden	( )	
Bureau of Prisons	( )	
Ct Reporter	( )	
Ctroom Deputy	( )	
Orig-Security	(✓)	
Federal Public Defender	( )	
Summons Issued	( )	with N/C attached to complt. and served by: U.S. Marshal ( ) Pltf's Attorney ( )
Standard Order 93-5	( )	
Order to Show Cause	( )	with Petition attached & mailed certified mail to: US Atty Gen ( ) PA Atty Gen ( ) DA of County ( ) Respondents ( )
Bankruptcy Court	( )	
Other_____	( )	

MARY E. D'ANDREA, Clerk

9/13/95

DEputy

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

PETER COOK,	:	CIVIL NO. **1:CV-95-0369**
	:	
Plaintiff	:	(Judge Caldwell)
	:	
vs.	:	(Magistrate Judge Blewitt)
	:	
LT. ROSENBURGER, et al.,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

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 March 15, 1995. (Doc. 1). In the complaint, Plaintiff alleges various violations of his Eighth and Fourteenth Amendment rights under the constitution. Named as Defendants are the following employees at SCI-Camp Hill: Lieutenant Terrance Rosenburger; Sergeant Donald Brown; Officers Anthony Ross and Raymond Stender; William Ward, Unit Manager; and Kenneth Kyler, Superintendent. Plaintiff seeks injunctive, compensatory, punitive, and such other relief as the court deems just.

On April 17, 1995, Plaintiff's request to proceed *in forma pauperis* was granted. (Doc. 7). On April 21, 1995, Plaintiff filed a motion seeking leave to file a supplemental complaint, together with a copy of the proposed supplemental complaint. (Doc. 8). The court granted Plaintiff's request and has construed Documents 1 and 8 as the complaint in this action. (Doc. 9). On June 19, 1995, the Defendants filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). **(Doc. 14)**. Thereafter, a motion for leave to file an amended complaint was filed by Plaintiff and subsequently denied by the court.

(Docs. 17, 20). Plaintiff's proposed amended complaint and brief in support have been construed by the court as Plaintiff's brief in opposition to Defendants' motion to dismiss. (Docs. 21; 20, p.2).

On August 2, 1995, Defendants filed a brief in support of their motion to dismiss. (Doc. 23). Plaintiff then filed a document entitled "Plaintiff's Brief in Oppersision (sic) to Defendants (sic) Motion to Dismiss." (Doc. 24). We will construe Documents 21 and 24 as Plaintiff's opposition brief in this matter. The motion is ripe for consideration.

In the complaint, Plaintiff alleges that on March 5, 1995, he was approached by Defendant Ross who "said something to upset him". (Doc. 1, p.5). Plaintiff states that he then threw milk at the Defendant when the Defendant attempted to pass him toilet paper. At this point, Plaintiff alleges that Defendants Brown and Rosenburger came to his cell and that Defendant Brown verbally threatened him. (Doc. 1, p.5). Plaintiff was then ordered to place his hands outside of the tray slot to be handcuffed. Plaintiff claims that he refused to do so because of Defendant Brown's threat.

Plaintiff was again ordered to place his hands out to be handcuffed, and once again refused. He alleges that Defendant Brown sprayed mace into his cell, at which time Plaintiff placed his hands out to be handcuffed. Plaintiff claims that he was then brutally removed from his cell and slammed against the wall and floor. He further contends that his cell was stripped of blankets, sheets, and personal belongings which included letters, toilet paper, toothpaste, and shower shoes. He also alleges that his water was turned off. (Doc. 1, p.5). Afterwards, Plaintiff claims that he was brutally placed back into his cell. He alleges that he requested to see a doctor because his hands and one leg were numb and his wrist

was bleeding. Plaintiff claims that he was never examined by a doctor but that the handcuffs were removed.

Plaintiff alleges that he received no food from 2:00 p.m. until 10:00 p.m. and that it was the next day when he was given a cheese sandwich. He further contends that it was not until March 7, 1995, two days following the incident, that his shackles were taken off and his water turned on. Plaintiff also claims that his requests for the return of his blanket and other personal items were denied during this time.

In his supplemental complaint, Plaintiff basically reiterates the claims contained in the original complaint; however, he does include two additional claims. First, Plaintiff appears to claim that he was denied due process with respect to a misconduct report Defendant Ross issued against him on March 24, 1995. (Doc. 8, Exh. "Misconduct Report dated 3-24-95). Plaintiff was charged with lying to an employee regarding what occurred during the March 5, 1995 incident. Plaintiff contends he was denied due process with respect to this misconduct charge because neither he nor his witnesses were interviewed before the misconduct report was filed.

Plaintiff also alleges in the supplemental complaint that he is being harassed by the filing of false misconduct reports. In particular, Plaintiff contends that because of the lawsuits he has filed, the Defendants are taking retaliatory measures against him.

Defendants have filed a motion to dismiss the complaint in this action based on the failure of Plaintiff to state a claim upon which relief can be granted. **(Doc. 14)**. 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).

In order to state a claim pursuant to 42 U.S.C. §1983, Plaintiff must show that the Defendants acted under color of state law, that a federally secured right is implicated, and that the Defendants deprived Plaintiff or caused the deprivation of that right. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981). Liability may therefore only be based upon the Defendants' personal involvement in conduct amounting to a constitutional violation. *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077 (3d Cir. 1976).

We will first address Plaintiff's claim that he was subjected to excessive force and cruel and unusual punishment with respect to the March 5, 1995, incident. It is well established that not every push or shove violates a prisoner's constitutional rights. *See Whitley v. Albers,* 475 U.S. 312 (1986); *Johnson v. Glick,* 481 F.2d 1028 (2d Cir. 1973). The core inquiry in situations which involve the prison's internal security and where excessive force is alleged is "whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically to cause harm."[1] *Hudson v. McMillian,* 112 S.Ct. 995 (1992), citing *Whitley v. Albers,* 475 U.S. 251 (1986). In order to constitute cruel and unusual

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1. This standard has been expanded to include all allegations of excessive force. *Hudson v. McMillian*, 112 S.Ct. 995 (1992).

punishment, the correctional officers' use of force must involve "unnecessary and wanton infliction of pain." *Whitley,* 475 U.S. at 319.

In the present case, Plaintiff's own chronology of the events of March 5, 1995, reveals that the actions taken by the Defendants were necessary to restore discipline and maintain prison order. Plaintiff offers nothing from which one could infer that the Defendants' actions were the product of any malicious intent to cause injuries to the Plaintiff. Plaintiff admits to throwing milk at Defendant Ross when the Defendant attempted to hand him toilet paper. While Plaintiff claims he did so in response to some comment Defendant Ross allegedly made to him, it has 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 1028, 1033 n.7 (2d Cir. 1973) *cert. denied,* 414 U.S. 1033 (1973). In addition, Plaintiff admits to kicking on his cell door and to disobeying a direct order which was given not once, but twice, to place his hands outside the tray slot to be handcuffed. As such, it is clear that the Defendants did not use excessive force against Plaintiff.

Plaintiff next claims that he was denied medical treatment by Defendants Rosenburger and Brown after he was returned to his cell following the above incident. In his original complaint, Plaintiff states that he requested to see a doctor because "...[his] hands and one leg had no feeling in them and [his] wriss (sic) was bleeding and swollen". (Doc. 1, p.5).[2]

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2. While Plaintiff does not identify whom the request was made to in his original complaint, he does state in his supplemental complaint that the request was made to Defendants Rosenburger and Brown. (Doc. 8, p.7).

In order for a Plaintiff to prevail on an Eighth Amendment claim under 42 U.S.C. §1983 based on inadequate medical care, it must be found that the Defendants acted with "deliberate indifference to serious medical needs" of the plaintiff while a prisoner. *Estelle v. Gamble*, 429 U.S. 97 91976). A prison official cannot be found liable under the Eighth Amendment unless the official knows and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Farmer v. Brennan,* ___ U.S. ___, 114 S.Ct. 1970, 1982 (1994). Further, a prison official who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. *Farmer,* 114 S.Ct. at 1982-83.

In the present case, Plaintiff fails to demonstrate that his medical need was a serious one. Plaintiff merely alleges that he had no feeling in his hand and leg and that his wrist was swollen and bleeding. The injuries were allegedly incurred when Plaintiff was removed from his cell, handcuffed, shackled and returned to his cell. Plaintiff does not set forth any allegations demonstrating that the Defendants disregarded an excessive risk to his health. Further, Plaintiff does state that the handcuffs were removed once he was back in his cell. As such, this claim must be dismissed.

Plaintiff next claims that he was subjected to cruel and unusual punishment, in that following the return to his cell, his water was cut off, he was given no food from 2 p.m. to 10 p.m., his personal items were removed, and his blanket was taken. He further claims

that on March 6, 1995, the day following the above incident, he was only given a cheese sandwich to eat.

A claim of cruel and unusual punishment must contain allegations which "involve the unnecessary and wanton infliction of pain." *Estelle v. Gamble,* 429 U.S. 97, 103 91976). Conditions which inflict needless suffering, whether physical or mental, may constitute cruel and unusual punishment. *Tillery v. Owens,* 719 F.Supp. 1256 (W.D. Pa. 19889), citing *Battle v. Anderson,* 564 F.2d 388, 393 (10th Cir. 1977). Punishment is cruel and unusual only if it is "...unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe it serves any penal purpose more effectively than some less severe punishment." *Rhodes v. Robinson,* 612 F.2d 766 (3d Cir. 1979), citing *Furman v. Georgia,* 408 U.S. 238 (1972).

The conditions alleged by Plaintiff, alone or in combination, do not constitute cruel and unusual punishment. Plaintiff's cell was searched and his personal items confiscated following an incident wherein Plaintiff threw milk at a corrections officer, engaged in kicking his cell door, and refused to obey direct orders given by the Defendants. The fact that his water was shut off and he was subject to food restriction for a short period of time certainly do not constitute conditions subjecting Plaintiff to "needless suffering", nor do they involve "the unnecessary and wanton infliction of pain." In addition, Plaintiff admits that although he was not given anything to eat between 2 p.m. and 10 p.m., he was given a cheese sandwich the next day. Also, Plaintiff's water was turned back on the following day. As such, these claims must be dismissed as well.

Plaintiff's next claim is contained in the supplemental complaint. He contends that on March 24, 1995, he received a misconduct from Defendant Ross. It appears, although it is somewhat unclear, that the misconduct was issued because Plaintiff lied to a prison employee on a request slip with respect to what occurred during the March 5, 1995, incident. (Doc. 8, p.1; Exh. "D"). Plaintiff contends that he was denied due process, in that neither he nor his witnesses were interviewed before the misconduct report was filed, thus resulting in a one-sided investigation.

In *Wolff v. McDonnell,* 418 U.S. 539 (1974), the Supreme Court decided what process is due a prisoner who is facing a misconduct charge. The court held that due process requires that the prisoner receive written notice of the charges against him no less than 24 hours before the hearing; that the prisoner be given a written statement by the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken; that the prisoner be afforded a qualified right to call witnesses and present documentary evidence in his own defense; and that an illiterate inmate be entitled to help from a fellow inmate. *Id.* at 564-571. In *Superintendent v. Hill,* 472 U.S. 445 (1985), the Supreme Court added the further requirement that the decision of the factfinder must be supported by some evidence in the record.

In this case, Plaintiff is not claiming that he was not provided with any of the above required due process rights, but rather, that he and his witnesses were not interviewed prior to the filing of the misconduct report. There exists no due process requirement that the filing officer engage in such a procedure. Further, following the filing of the charge, Plaintiff was provided with notice of the charge, afforded the right and did call witnesses and

present evidence at the hearing, and was provided a written statement from the factfinder as to the evidence relied on in reaching his decision. (Doc. 8, Exh. "D"). Clearly, there has been no violation by the Defendants of Plaintiff's due process rights, and this claim must be dismissed.

Plaintiff's final claim is that he is being harassed and is the subject of fabricated misconducts by the Defendants in retaliation for the lawsuits he has filed. The only misconduct Plaintiff refers to in his complaint is the March 24, 1995, misconduct discussed above. The only other instance Plaintiff provides of an alleged act of retaliation is when he was denied exercise and a shower while housed in the Special Management Unit as a result of the March 5, 1995, incident.[3]

In bringing an action for retaliation, an inmate faces "a substantial burden in attempting to prove that the actual motivating factor...was as he alleges." *McDonald v. Hall,* 610 F.2d 16, 18 (1st Cir. 1979). In order to establish that the Defendants ordered a misconduct issued to the Plaintiff in retaliation for actions taken by the Plaintiff, the Plaintiff must prove, by specific evidence and not conclusory statements, that he would not have been issued a misconduct "but for" Plaintiff's actions. *McDonald*, 610 F.2d at 18, citing *Mount Healthy City Board of Ed. v. Doyle,* 429 U.S. 274 (1977); *Flaherty v. Coughlin,* 713 F.2d 10, 13

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3. Plaintiff also contends that he is being harassed and as examples gives the incidents which are the subject of two of Plaintiff's lawsuits presently pending in this court. The two lawsuits referred to by Plaintiff are *Cook v. Brown*, 1994-CV-1987, which involves a strip search Plaintiff was given following his return to the prison after a court appearance, and *Cook v. Brown*, 1994-CV-1988, wherein Plaintiff alleges Defendant Brown destroyed his legal mail.

(2d Cir. 1985). It has been held that a complaint which alleges retaliation in wholly conclusory terms may be dismissed on the pleadings alone. *Flaherty,* 713 F.2d at 13.

It is clear after reviewing Plaintiff's complaint that his allegations of retaliation are purely conclusory, speculative at best. With respect to the false misconduct Plaintiff alleges, it has already been discussed and determined that Plaintiff was afforded all the procedural due process protections required pursuant to *Wolff v. McDonnell,* 418 U.S. 539 (1974). With respect to Plaintiff's claims that he was denied exercise and shower privileges while housed in the SMU, Plaintiff first fails to even identify which, if any, of the named Defendants were involved in the alleged denial of said privileges. Further, Plaintiff provides no factual allegations in support of his contention that the denial of said privileges was in retaliation for some action taken on Plaintiff's part. To the contrary, the alleged facts in Plaintiff's complaint fail to give rise to even a "colorable suspicion" of retaliation. As such, we find that Plaintiff has failed to state a claim for retaliation.

Based on the foregoing, it is respectfully recommended that the Defendants' motion to dismiss **(Doc. 14)** be granted and that the complaint be dismissed in its entirety with respect to all Defendants.

THOMAS M. BLEWITT
United States Magistrate Judge

Dated: August 16, 1995

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PETER COOK,	:	CIVIL NO. **1:CV-95-0369**
	:	
Plaintiff,	:	
	:	(Judge Caldwell)
v.	:	
	:	(Magistrate Judge Blewitt)
LT. ROSENBURGER, et al.,	:	
	:	
	:	
Defendants	:	

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **August** 16, **1995.**

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.31 which provides:

> Any party may object to a magistrate's proposed findings, recommendations or report under subsections 72.4, 72.5, and 72.6 of these rules, *supra*, **within ten (10) days** after being served with a copy thereof. Such party shall file with the Clerk of Court, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Rule 72.30 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

THOMAS M. BLEWITT
United States Magistrate Judge

Dated: August 16, **1995**

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

Re: 1:95-cv-00369 Cook v. Rosenburger

True and correct copies of the attached were mailed by the clerk to the following:

Peter Cook
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BI-9152
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Jill A. Devine, Esq.
Assistant Counsel
Pa. Dept of Corrections
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2520 Lisburn Road
Camp Hill,, Pa 17001

cc:

Judge	( )	
Magistrate Judge	( )	
U.S. Marshal	( )	
Probation	( )	
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Standard Order 93-5	( )	
Order to Show Cause	( )	with Petition attached & mailed certified mail to: US Atty Gen ( ) PA Atty Gen ( ) DA of County ( ) Respondents ( )
Other_____	( )	

MARY E. D'ANDREA, Clerk

DATE: 8/16/95

BY: KCW
Deputy Clerk