

When considering a complaint accompanied by a motion to proceed in forma pauperis, a district court may rule that process should not be issued if the complaint is malicious or legally frivolous, meaning it presents an unquestionably meritless legal theory or is predicated on clearly baseless factual averments. Neitzke v. Williams, 490 U.S. 319, 327-28 (1989); Wilson v. Rackmill, 878 F.2d 772, 774 (3d Cir. 1989). Unquestionably meritless legal theories are those " 'in which either it is readily apparent that the plaintiff's complaint lacks an arguable basis in law or that the defendants are clearly entitled to immunity from suit. . . . ' " Roman v. Jeffes, 904 F.2d 192, 194 (3d Cir. 1990) (quoting Sultenfuss v. Snow, 894 F.2d 1277, 1278 (11th Cir. 1990)). Clearly baseless factual contentions describe scenarios "clearly removed from reality." Id. "[T]he frivolousness determination is a discretionary one," and trial courts "are in the best position" to determine when an indigent litigant's complaint is appropriate for summary dismissal. Denton v. Hernandez, 504 U.S. 25, 33 (1992). When reviewing a complaint for frivolity under § 1915(d), the court is not bound, as it is on a motion to dismiss, "to accept without question the truth of the plaintiff's allegations." Id.

(...continued)

court shall dismiss the case at any time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

at 32.

Plaintiff's complaint, including typographical errors, states as follows:

"On March 22, 2003, I, Mr. Eakle had an electroencephalographic (sic) test done. At that time it was consented by Dr. Symons and done by Dr. Roemer. Do to the test at that time which was Sat. at 7.5/5 mm and 55,000 ohms for 30 mm per second. But also do to the neglect of safety and perceger (sic) of Doc. I, Mr. Eakle am on medication from harassment of staff. The test was done for possible seizer (sic) which was not Mr. Eakle consent or acknowledgment of the test."

(Compl. at 2). Plaintiff seeks compensatory and punitive damages, as well as injunctive relief. Id.

DISCUSSION

A plaintiff, in order to state a viable § 1983 claim, must plead two essential elements: 1) that the conduct complained of was committed by a person acting under color of state law, and 2) that said conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. See, e.g., Groman v. Township of Manalapan, 47 F.3d 628, 638 (3d Cir. 1995); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1141-42 (3d Cir. 1990).

Claims brought under § 1983 cannot be premised on a theory of respondeat superior. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Rather, each named defendant must be shown, via the complaint's allegations, to have been personally involved in the events or occurrences which underlie a claim. See

Rizzo v. Goode, 423 U.S. 362 (1976); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976). As explained in Rode:

A defendant in a civil rights action must have personal involvement in the alleged wrongs. . . . [P]ersonal involvement can be shown through allegations of personal directions or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.

Rode, 845 F.2d at 1207.

An application of the above standard to Plaintiff's Complaint clearly shows that he has failed to set forth a cognizable claim against Defendant Tennis.

Plaintiff is attempting to impose liability on Defendant Tennis under the theory of respondeat superior, which under Section 1983 he cannot do.

Further, as noted above, Plaintiff claims that it was the alleged negligence of the Defendant Doctors in administering a medical test on him that caused Plaintiff harm. He does not contend that they acted in bad faith, or allege anything which would point to deliberate indifference to or callous disregard of Plaintiff's safety. The United States Supreme Court has held that negligence or inadvertence alone do not constitute a constitutional deprivation. See, e.g., Whitley v. Albers, 475 U.S. 312 (1986); Davidson v. O'Lone, 474 U.S. 344 (1986). In Daniels v. Williams, the Court noted that "[l]ack of due care suggests no more than a failure

to measure up to the conduct of a reasonable person." 474 U.S. 327, 332 (1986). Since the Defendant Doctors' conduct constituted negligence, at best, they cannot be found to have violated Plaintiff's Constitutional rights under Section 1983, and thus Plaintiff again fails to state a cognizable claim.

Finally, to the extent that plaintiff alleges that he is "on medication from harassment of staff," it is well established that verbal harassment or threats will not, without some reinforcing act accompanying them, state a constitutional claim. It has been held that the use of words, however violent, generally cannot constitute an assault actionable under § 1983. See Maclean v. Secor, 876 F. Supp. 695, 698-99 (E.D. Pa. 1995) (holding that threats based on inmate's status as known sex offender did not violate Eighth Amendment); Murray v. Woodburn, 809 F. Supp. 383, 384 (E.D. Pa. 1993) ("Mean harassment . . . is insufficient to state a constitutional deprivation."); Prisoners' Legal Ass'n v. Roberson, 822 F. Supp. 185, 189 (D.N.J. 1993) ("[V]erbal harassment does not give rise to a constitutional violation enforceable under § 1983.").

Mere threatening language and gestures of a custodial officer do not, even if true, amount to constitutional violations. Johnson v. Glick, 481 F.2d 1028, 1033 n.7 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)(holding that not every push or shove by a prison guard, even if it may later seem unnecessary in the peace of a

judge's chambers violates a prisoner's constitutional rights); see also Balliet v. Whitmire, 626 F. Supp. 219, 228-29 (M.D. Pa.) ("[v]erbal abuse is not a civil rights violation . . ."), aff'd, 800 F.2d 1130 (3d Cir. 1986) (Mem.); Collins v. Cundy, 603 F.2d 825, 826 (10th Cir. 1979) (finding that allegations that sheriff laughed at prisoner and threatened to harm him did not state a claim for constitutional violation). Further, it has also been held that a constitutional claim based only on verbal threats will fail regardless of whether it is asserted under the Eighth Amendment's cruel and unusual punishment clause, see Prisoners' Legal Ass'n, 822 F. Supp. at 189, or under the Fifth Amendment's substantive due process clause, see Pittsley v. Warish, 927 F.2d 3, 7 (1st Cir.), cert. denied, 502 U.S. 879 (1991).

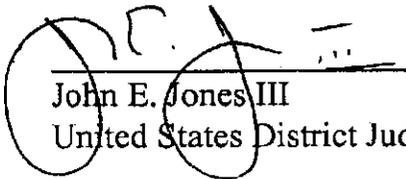
Verbal harassment or threats, with some reinforcing act accompanying them, however, may state a constitutional claim. One such case is where some action was taken by the defendant that escalated the threat beyond mere words. See Northington v. Jackson, 973 F.2d 1518 (10th Cir. 1992) (guard put a revolver to the inmate's head and threatened to shoot); Douglas v. Marino, 684 F. Supp. 395 (D.N.J. 1988) (involving a prison employee who threatened an inmate with a knife).

Based on the forgoing, Plaintiff's Complaint is "based on an indisputably meritless legal theory" and thus will be dismissed, without prejudice, as legally

frivolous. Wilson v. Rackmill, 878 F.2d 772, 774 (3d Cir. 1989). Under the circumstances, the court is confident that service of process is not only unwarranted, but would waste the increasingly scarce judicial resources that § 1915(d) is designed to preserve. See Roman v. Jeffes, 904 F.2d 192, 195 n. 3 (3d Cir. 1990).

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's Motion to Proceed In Forma Pauperis (Doc. 2), is granted for the purpose of filing the Complaint only.
2. The Complaint is dismissed without prejudice under 28 U.S.C. § 1915(e)(2)(B)(ii).
3. The Clerk of Court is directed to close this case.
4. Any appeal from this order will be deemed frivolous, not taken in good faith and lacking probable cause.


John E. Jones III
United States District Judge