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12/27/96
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UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

DAVID FISHER,
Plaintiff

vs.

F.K. FRANKS and PATTY YARGER,
Defendants

:
:
: No. 4:CV-96-2184
:
: (Complaint Filed 12/17/96)
:
: (Judge Muir)
:
:

FILED
WILLIAMSPORT
DEC 24 1996

ORDER

December 24, 1996

PER ph DEPUTY CLERK

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

David Fisher, an inmate presently confined at the State Correctional Institution in Huntingdon, Pennsylvania ("SCI-Huntingdon"), initiated this civil rights action pursuant to 42 U.S.C. § 1983. The plaintiff proceeds in forma pauperis under 28 U.S.C. § 1915. The complaint initially was filed on August 26, 1996, in the United States District Court for the Western District of Pennsylvania. The Western District Court dismissed two (2) of the four (4) defendants because the claims against them were frivolous. Because the other defendants apparently work at SCI-Huntingdon, which is within the Middle District of Pennsylvania, the remainder of the case was transferred to this court.

The Prison Litigation Reform Act (the "Act"), Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996) imposed new obligations on prisoners who file suit and wish to proceed in forma pauperis in a federal court, e.g., the full filing fee ultimately must be paid (at least in a non-habeas suit). After this case was filed

Certified from the record
Date 12-24-96
May E. D'Andrea, Clerk
Per S. Hess
Deputy Clerk

in this court, an administrative order was issued on December 17, 1996 which, inter alia, directed the appropriate official at SCI-Huntingdon to deduct monies from the plaintiff's trust fund account, including an initial partial filing fee, and to forward payments to the court in satisfaction of the \$120.00 filing fee. Document 3 of the record. However, several months ago the Western District Court issued a similar order that included a directive to pay an initial partial filing fee of \$8.63. Thus, the court, in the instant order, will direct the appropriate official at SCI-Huntingdon to: refrain from calculating and remitting a second initial partial filing fee; send filing fee payments only to this court and not to the Western District Court; and to deduct and forward a total of \$120.00, taking into account all payments that already have been made to the Western District Court as well as to this court.

There are two (2) remaining defendants in this suit, who hold supervisory positions at SCI-Huntingdon: Superintendent F.K. Franks and Patty Yarger. The exact nature of Yarger's employment is not described. However, the plaintiff states: "They [Franks and Yarger] and staff are ultimately responsible for the safety and medical well being of . . . the plaintiff David Fisher." Document 1 of the record, Complaint, p. 1. Fisher proceeds to allege that he was subjected to cruel and unusual punishment, primarily because of purportedly inadequate medical care by an SCI-Huntingdon physician (not Yarger) and by various unnamed SCI-

Huntingdon officials. The plaintiff requests declaratory, monetary, and injunctive relief.

For the reasons set forth below, the remaining claims in the instant complaint will be dismissed without prejudice because they are not claims upon which relief may be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), which was created by § 804(a)(5) of the Act.

DISCUSSION

Section 1915(e)(2) of Title 28 of the United States Code provides:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the 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.

(Emphasis added.) Federal Rule of Civil Procedure 12(b)(6) allows a defendant, in response to a complaint, to file a motion to dismiss a claim or claims for "failure to state a claim upon which relief can be granted. . . ." The Act provides this new ground for summary dismissal of a complaint (before service)--failure to state a claim under Rule 12(b)(6) principles. In Rule 12(b)(6) analysis, the court must accept the veracity of a plaintiff's factual allegations (not legal arguments or conclusions). *White vs. Napoleon*, 897 F.2d 103, 106 (3d Cir. 1990). "The test for reviewing a 12(b)(6) motion is whether under any reasonable

reading of the pleadings, plaintiff may be entitled to relief." Simon vs. Cebrick, 53 F.3d 17, 19 (3rd Cir. 1995).

A plaintiff, in order to state a viable § 1983 claim, must make a showing that the conduct complained of was committed by a person acting under color of state law and that said conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or by a statute of the United States. Cohen vs. City of Philadelphia, 736 F.2d 81, 83 (3d Cir.), cert. denied, 469 U.S. 1019 (1984). A prerequisite for a viable civil rights claim is that a defendant directed, or knew of and acquiesced in, the deprivation of a plaintiff's constitutional rights. Monell vs. Department of Social Serv. of the City of N.Y., 436 U.S. 658, 694-95 (1979); Gay vs. Petsock, 917 F.2d 768, 771 (3d Cir. 1990); Capone vs. Marinelli, 868 F.2d 102, 106 n.7 (3d Cir. 1989). This is the personal involvement requirement. Liability may not be imposed under § 1983 on the principle of respondeat superior. Capone, 868 F.2d at 106 (citing Hampton vs. Holmesburg Prison Officials, 546 F.2d 1017, 1082 (3d Cir. 1976)).

The plaintiff simply has not alleged facts indicating that Franks and Yarger were involved in the alleged cruel and unusual punishment. They may not be held liable simply because of their supervisory responsibilities. There is no viable remaining claim. Thus, the remainder of this suit will be dismissed.

NOW, IT IS HEREBY ORDERED THAT:

1. The remaining claims in the complaint are dismissed

without prejudice because they are not claims upon which relief may be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

2. All pending motions are denied as moot.

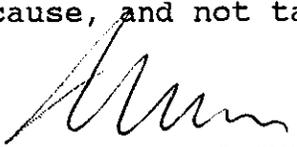
3. The official responsible for maintaining the plaintiff's trust fund account shall: a) refrain from calculating and remitting a second initial partial filing fee; b) send filing fee payments only to the Clerk of this court and not to the Clerk of the Western District Court; and c) deduct and forward a total of \$120.00 and no more, in accordance with the December 17, 1996 Administrative Order, taking into account all payments that already have been made to the Western District Court as well as to this court.

4. All payments shall be remitted to:

Clerk of Court
Financial Department
P.O. Box 1148
Scranton, PA 18501-1148

5. The Clerk of Court shall close this case.

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



MUIR
United States District Judge

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