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6-27-97

UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

DAVID FISHER,  
  
Plaintiff  
  
vs.  
  
F.K. FRANK, ET AL.,  
  
Defendants

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No. 4:CV-97-0722  
  
(Complaint Filed 5/6/97)  
  
(Judge Muir)

FILED  
WILLIAMSPORT, PA

JUN 26 1997

ORDER

June 26 , 1997

MARY E. D'ANDREA, CLERK  
Per [Signature]  
Deputy Clerk

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

David Fisher, an inmate presently confined at the State Correctional Institution, Huntingdon, Pennsylvania (SCI-Huntingdon) initiated the above pro se civil rights complaint pursuant to 42 U.S.C. § 1983. Along with his action, plaintiff has submitted an application requesting leave to proceed in forma pauperis.

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 civil rights actions in federal court and wish to proceed in forma pauperis under 28 U.S.C. § 1915, e.g., the full filing fee ultimately must be paid.<sup>1</sup> One section of the

1. Fisher completed this court's form application to proceed in forma pauperis and authorization to have funds deducted from his prison account. The court then issued an Administrative Order directing the warden of SCI-Huntingdon to commence deducting the full filing fee from plaintiff's prison trust fund account.

Certified from the record  
Date 6-26-97  
Mary E. D'Andrea, Clerk  
Per [Signature]  
Deputy Clerk

Act requires courts to conduct an initial screening of complaints in prisoner actions. For the reasons set forth below, the instant complaint will be dismissed, without prejudice, as legally frivolous pursuant to the screening provisions of the Act, specifically, § 1915(e)(2)(B)(i).<sup>2</sup>

When considering a complaint accompanied by a motion to proceed in forma pauperis, a district court may determine that process should not be issued if the complaint is malicious, presents an indisputably meritless legal theory, or is predicated on clearly baseless factual contentions. *Neitzke vs. Williams*, 490 U.S. 319, 327-28 (1989); *Wilson vs. Rackmill*, 878 F.2d 772, 774 (3d Cir. 1989).<sup>3</sup> "The 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

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2. Section 1915(e)(2), which was created by § 804(a)(5) of the Act, provides:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at anytime 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.

3. Indisputably meritless legal theories are those "in which it is either 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 vs. Jeffes*, 904 F.2d 192, 194 (3d Cir. 1990) (quoting *Sultenfuss vs. Snow*, 894 F.2d 1277, 1278 (11th Cir. 1990)). Clearly baseless factual contentions describe scenarios "clearly removed from reality." *Id.*

summary dismissal. Denton vs. Hernandez, 504 U.S. 25, 112 S.Ct. 1728, 1734 (1992).

Named as defendants are Martin Horn, Commissioner of the Pennsylvania Department of Corrections (DOC), and F.K. Frank, Superintendent at SCI-Huntingdon. Fisher generally asserts that he has been: denied adequate medical care; assaulted by both staff and inmates; provided with an undersized bed; confined in the prison's Restricted Housing Unit (RHU) for an excessive period of time; and had personal property improperly destroyed. He asserts that defendants "have been notified of the violations but fail to correct the wrongs in fact won't admit that any wrong is taking place here." (Doc. 1, IV(2).) As relief, Fisher seeks compensatory and punitive damages, as well as injunctive relief, specifically, that he be removed from the custody of the DOC.<sup>4</sup>

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. Groman vs. Township of Manalapan, 47 F.3d 628, 638 (3d Cir. 1995); Shaw by Strain vs. Strackhouse, 920 F.2d 1135, 1141 (3d Cir. 1990). Liability may not be imposed under § 1983 on the

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4. Plaintiff also requests that this action be consolidated with two or three other cases that he previously initiated before this court. However, since those actions have all been terminated, his request is clearly moot.

traditional standards of respondeat superior. Capone vs. Marinelli, 868 F.2d 102, 106 (3d Cir. 1989) (citing Hampton vs. Holmesburg Prison Officials, 546 F.2d 1017, 1082 (3d Cir. 1976)). In Capone, the court noted "that supervisory personnel are only liable for the § 1983 violations of their subordinates if they knew of, participated in or acquiesced in such conduct." 868 F.2d at 106 n.7.

Purported conduct of correctional officials which occurs after an alleged civil rights violation cannot be the basis of a § 1983 claim because there is insufficient personal involvement. The Court of Appeals for the Third Circuit in Rode vs. Dellarciprete, 845 F.2d 1195, 1208 (3d Cir. 1988), noted to permit imposition of liability for conduct of a policymaker after the events in question would impose liability in the absence of personal involvement. It has similarly held that under Rode, averments that a supervisory official approved or ratified a subordinate's conduct after the event were insufficient for liability. Clark vs. Borough of Hanover, Civ. No. 92-595, slip op. at 14 (M.D. Pa. Sept. 11, 1992) (Caldwell, J.); see also Holman vs. Walls, Civ. A. No. 86-1 JRR, 1989 WL 66636 at 6\* (D. Del. June 13, 1989), (failure to discipline after the fact was insufficient to show a policy); and Krisko vs. Oswald, 655 F. Supp. 147, 152 (E.D. Pa. 1987) (post hoc approval insufficient).

It is initially noted that Fisher fails to indicate when the purported misconduct occurred. His complaint also does not

set forth any factual averments regarding his wholly conclusory allegations. He asserts only that defendants were notified of the purportedly unconstitutional acts after they occurred but failed to take any corrective action. Consequently, it appears that plaintiff is attempting to establish liability against the named defendants either on the basis of their supervisory capacities or under a theory of post incident liability, both of which are clearly insufficient for purposes of § 1983.

Secondly, it is well-settled that liberty interests protected by the Fourteenth Amendment may arise either from the Due Process Clause itself or from state law. *Meachum vs. Fano*, 427 U.S. 215, 223, 227 (1976). The United States Supreme Court in *Hewitt vs. Helms*, 459 U.S. 460 (1983), addressed the issue of whether the removal of a Pennsylvania state inmate from general population and his subsequent placement in administrative segregation violated due process. The Court stated that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." Therefore, there was no liberty interest under the Due Process Clause itself. *Id.* at 468.

However, the Court held that Pennsylvania law did create a protected liberty interest for state inmates in remaining in the general prison population. Thus, it concluded Pennsylvania state inmates must receive certain due process, specifically, an informal non-adversarial review as a prerequisite to their being

placed in administrative custody. The opinion noted that a state law which "used language of an unmistakably mandatory character, requiring certain procedures 'shall', 'will,' or 'must' be employed," creates a protected liberty interest. Id. at 471.

The Supreme Court thereafter abandoned the approach of ascertaining the existence of a liberty interest articulated in Hewitt. See Sandin vs. Conner, 115 S.Ct. 2293, 2298-2300 (1995). In Sandin, the Court held that a liberty interest is not created merely because a prison regulation limits the discretion of prison officials.

Recently, in Griffin vs. Vaughn, 112 F.3d 703 (3d Cir. 1997), <sup>the</sup> ~~our~~ Court of Appeals for the Third Circuit addressed an action initiated by a Pennsylvania state inmate who had been held in administrative custody for a prolonged period. The Court applied Sandin and concluded that placement without any type of due process hearing for a period of fifteen (15) months was not an atypical and significant hardship. Furthermore, the inmate's "commitment to and confinement in administrative custody did not deprive him of a liberty interest and that he was not entitled to procedural due process protection." Id. at 708. It added that prolonged confinement in administrative custody was not cruel and unusual punishment. Id. at 709. Finally, an inmate placed in administrative custody pursuant to a legitimate penological reason could "be required to remain there as long as that need continues." Id. In the instant case, plaintiff does not claim

that his RHU confinement was premised or unnecessarily prolonged on the basis of illegitimate factors. Consequently, under Sandin and Griffin, Fisher's general claims relating to the length of his RHU confinement do not implicate a constitutional right.

Prison officials violate an inmate's right to be free from cruel and unusual punishment when, through intentional conduct or deliberate indifference, they subject the inmate to violence at the hands of another. Young vs. Quinlan, 960 F.2d 351, 361 (3d Cir. 1992); Riley vs. Jeffes, 777 F.2d 143, 147 (3d Cir. 1985). The plaintiff must prove more than that he had a fight with another inmate, see Beard vs. Lockhart, 716 F.2d 544, 545 (8th Cir. 1983), and mere negligent conduct that leads to serious injury of a prisoner does not expose a prison official to liability under § 1983. Davidson vs. Cannon, 474 U.S. 344, 347-48 (1986). Therefore, when an inmate is assaulted, the victim's custodian is exposed to civil rights liability only when "he knows or should have known of a sufficiently serious danger to [the] inmate." Young, 960 F.2d at 361; see also Martin vs. White, 742 F.2d 469, 474 (8th Cir. 1984); Mosby vs. Mabry, 697 F.2d 213, 215 (8th Cir. 1982).

The Court of Appeals "stress[ed], however, that in constitutional context 'should have known' is a phrase of art with a meaning distinct from its usual meaning in the context of the law of torts." Young, 960 F.2d at 361. As <sup>the</sup> our Court of Appeals explained the phrase "does not refer to a failure to note a risk

that would be perceived with the use of ordinary prudence." Colburn vs. Upper Darby Township, 946 F.2d 1017, 1025 (3d Cir. 1991). Instead, "[i]t connotes something more than a negligent failure to appreciate the risk . . . , though something less than subjective appreciation of that risk." Id. Moreover, "the risk of . . . injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges." Id. Consequently, liability only attaches when there is a "pervasive risk of harm to inmates<sup>5</sup> . . . and that the prison officials have displayed 'deliberate indifference' to the danger." Riley, 777 F.2d at 147. Fisher does not contend that either defendant had advance notice of any potential threat to his safety. Consequently, his complaint to the extent it can be construed as asserting a failure to protect claim is also meritless.

As required under Estelle vs. Gamble, 429 U.S. 97 (1976), an inmate plaintiff must demonstrate that prison officials have breached the standard of medical treatment to which he was entitled. The government has an "obligation to provide medical care for those whom it is punishing by incarceration." Id. at 103. However, a constitutional violation does not arise unless there is "deliberate indifference to serious medical needs of

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5. Our Court of Appeals has noted that "prison officials should, at a minimum, investigate each allegation of violence or threat of violence." Young, 960 F.2d at 363 n.23.

prisoners" which constitutes "unnecessary and wanton infliction of pain." Id. at 104 (citation omitted). The Court of Appeals for the Third Circuit has held that not every injury or illness enjoys constitutional protection; only serious medical problems are actionable. See *West vs. Keve*, 571 F.2d 158, 161 (3d Cir. 1978). Additionally, it has been noted that prison authorities have considerable latitude in the diagnosis and treatment of prisoners. *Inmates of Allegheny County Jail vs. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979).

Furthermore, a complaint that a physician or a medical department "has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment [as] medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle at 106. Where a prisoner has actually been provided with medical treatment, one cannot always conclude that, if such treatment was inadequate, it was no more than mere negligence. See *Durmer vs. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993). It is true that if inadequate treatment results simply from an error in medical judgment, there is no constitutional violation. See *id.* However, where a failure to provide adequate treatment is deliberate and motivated by non-medical factors, a constitutional claim may be presented. See *id.*

A later decision by the Supreme Court addressed the issue of what standard should be applied in determining deliberate

indifference in Eighth Amendment cases. The Court established that the proper analysis is whether a prison official "acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer vs. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 1981 (1994). The Court of Appeals for the Third Circuit in Durmer added that a non-physician defendant can not be considered deliberately indifferent for failing to respond to an inmate's medical complaints when he is already receiving treatment by the prison's medical staff. *Id.*

Fisher does not raise any allegation that Commissioner Horn or Superintendent Franks, both of whom are non-medical defendants, failed to provide him with any prescribed or recommended medical treatment, including the ordering of a special size bed. Thus, his allegations regarding denial of medical care and a bed also do not set forth viable civil rights claims. Finally, with respect to his assertion of having personal property improperly destroyed, there is also no indication that the named defendants had any involvement or acquiescence in that purported misconduct.

Since plaintiff's complaint is "based on an indisputably meritless legal theory" it will be dismissed, without prejudice, as legally frivolous. Wilson, 878 F.2d at 774. 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 is designed to preserve. See

Roman, 904 F.2d at 195 n.3. An appropriate order will enter.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion to proceed in forma pauperis is construed as a motion to proceed without full prepayment of fees and costs and the motion is granted for the purpose of filing the complaint only.
2. The complaint is dismissed, without prejudice, as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).
3. The Clerk of Court shall close this case.
4. Any appeal taken from this order will be deemed frivolous, without probable cause, and not taken in good faith.

  
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MUIR  
United States District Judge

MM:jvw

UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF PENNSYLVANIA

\* \* MAILING CERTIFICATE OF CLERK \* \*

Re: 4:97-cv-00722 Fisher v. Frank

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

David Fisher  
SCI-H  
SCI at Huntingdon  
BX-0895  
Drawer R  
1100 Pike Street  
Huntingdon, PA 16654-1112

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

DATE: \_\_\_\_\_

BY: \_\_\_\_\_  
Deputy Clerk