

TRAMAINE GARDNER,
Plaintiff

: IN THE COURT OF COMMON PLEAS
: OF ERIE COUNTY, PENNSYLVANIA
: CIVIL DIVISION

V.

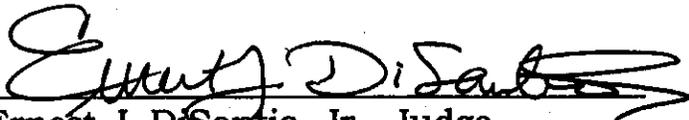
JEFFREY BEARD, DEPARTMENT OF :
CORRECTION, SUPERINTENDENT :
EDWARD T. BRENNAN, DEPUTY :
MARQUARDT, DEPUTY KORMANIC :
HEARING EXAMINER IVORY BARNETT :
CAPTAIN MILLER, SGT. RHODES, :
C.O. YURKO, SGT. WILSON, :
Defendants

: NO. 14113-2001

ORDER

AND NOW, this 7th day of January, 2003, for the reasons set forth in the accompanying opinion, it is hereby **ORDERED** that the Defendants' preliminary objections to the Plaintiff's first amended complaint are hereby **SUSTAINED**. It is further **ORDERED** that the amended complaint is **DISMISSED WITH PREJUDICE** under 42 Pa.C.S.A. §6602(e)(2) for Plaintiff's failure to state a claim upon which relief may be granted.

BY THE COURT:


Ernest J. DiSantis, Jr., Judge

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1-11-03

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CLERK OF THE COURT
PROthonARY
CIVIL DIVISION
JAN 7 1 44 PM '03

OPINION

This matter comes before the Court on the preliminary objections filed by the defendants to the plaintiff's first amended complaint. This Court was recently assigned this case and on November 15, 2002 issued an order governing how the case would proceed.

A. The Amended Complaint

The plaintiff, a pro se prisoner, resides at the State Correctional Institution at Albion, Pennsylvania. The defendants are Commonwealth of Pennsylvania Department of Corrections employees, or in Mr. Brennan's case, the former superintendent. Briefly summarizing this action, the plaintiff has filed a number of claims against these defendants in their official and individual capacities. (Complaint ¶3). Fundamentally, this is a claim under 42 U.S.C. §1983. He alleges that on or about April 29, 2001, Defendant Rhodes instructed the plaintiff to sit down, stating: "Hey boy, sit your ass down." (Complaint ¶¶ 5-7) and

indicated that he could call him anything that he wanted. The plaintiff asserts that on or about May 18, 2001 he complained to Defendant Wilson who advised him to reduce his complaint to writing to protect himself. (Complaint ¶8). Subsequently, he submitted request slips to Defendants Brennan, Marquardt, Kormanic and Miller regarding Defendant Rhodes' conduct. However he asserts that nothing was done. (Complaint ¶11). He generally alleges that other inmates have complained against Rhodes. (Complaint ¶10).

In tandem with this allegation, he alleges that various defendants retaliated against him for filing the grievance. He asserts that on August 24, 2001, prison officials filed a misconduct complaint against him for engaging in sexual acts with others. He was found guilty and received 45 days of disciplinary custody after his hearing. He appealed the guilty misconduct to the superintendent who upheld the guilty determination. (Complaint ¶20). He also makes a number of general claims throughout his first amended complaint, which do not appear to apply specifically to him.

The Court will now address each preliminary objection raised by the defendants.

1. The exhaustion issue

Actions brought by prisoners concerning prison life are subject to the condition precedent that the prisoner exhausts his/her administrative remedies. See, 42 U.S.C. §1997(e)(8); Porter v. Nussle, 534 U.S. 516, 532 (2002); Booth v. Churner, 532 U.S. 731, 739 (2001). Pennsylvania courts have followed this proposition. Goch v. Horn, 727 A.2d 645 (Cmwlth. Ct. 1999). See, also, Mitchell v. Horn, 1998 W.L. 695058 (ED.RA. 1998)

After its review, the finds that the plaintiff did exhaust his administrative remedies as evidenced by Mr. Bitner's letter of October 11, 2001. See, Exhibit B to plaintiff's response to the preliminary objections.

2. Issue of sovereign immunity.

It has been held that: "[s]tate officials acting within their official capacity are immune from suit." Hafer v. Melo, 502 U.S. 21, 23 (1991). The United States Supreme Court has also stated: "[s]uits against state officials in their official capacity should be treated as suits against the state." Kentucky v. Graham, 473 U.S. 159, 166 (1985). However, the Court has also noted: "[p]ersonal-capacity suits, on the other hand, seek to impose individual liability upon a governmental officer for activities taken under color of state law." Hafer, supra. at 25. Thus, "[o]n the merits to establish personal liability in a Section 1983 action, it is

enough to show that the official, acting under color of state law, caused the deprivation of a federal right." Id. (quoting, Graham at 166).

Clarifying the law, the Hafer court noted: "[a]cting within their official capacities is best understood as a reference to the capacity in which they are sued, not in the capacity which the officer inflicts the alleged injuries". Id. at 26. Hafer further established that: (1) officials sued in their individual capacities are persons "within the meaning of §1983", and (2) the 11th Amendment of the United States Constitution does not preclude such suits, nor are state officials absolutely immune from personal liability under §1983 solely by virtue of the official nature of their acts. Id. at 31.

Defendants correctly note that a Commonwealth employee acting within the scope of his or her employment or duties cannot be held liable for damages arising out of intentional torts. Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc., 694 A.2d 1134, 1140 (Pa. Cmwlth. 1997); 42 Pa.C.S.A. §8522. This applies to the Department of Corrections and its employees. Exceptions to sovereign immunity must be strictly construed and narrowly interpreted. Mascaro v. Youth Studies Center, 523 A.2d 1118 (Pa. 1987). [Various exceptions to sovereign immunity are set forth in 42 Pa.C.S.A. §8522(b) (1-9).] See also, Collins v. Bopson, 816 F.Supp. 335 (E.D. Pa. 1993). Therefore, to

the extent that the defendants have been sued in their official capacities, the suit is barred under the doctrine of sovereign immunity. (See, §8572(b)). The Court now turns to consideration of the suits against the defendants in their individual capacities.¹

In order to state a 1983 cause of action, the complaint must allege that: (1) some person has deprived the plaintiff of a federal right; and (2) the person who has deprived the plaintiff of that right acted under color of state or territorial law or the law of the District of Columbia. See, Gomez v. Toledo, 446 U.S. 635, 640 (1980). Furthermore, a plaintiff must assert his own rights and does not have standing to assert the rights of others. Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985). Furthermore, a 1983 claimant must identify a federally protected right. See, Gomez v. Toledo, supra. There must be an injury, and an injury to reputation only is not enough. Thomas v. Kipperman, 846 F.2d 1009, 1010 (5th Cir. 1988). Name-calling, even if obscene, is not a constitutional violation. Martin v. Sargent, supra. at 1337.

As a general proposition, a correctional commissioner or superintendent of a correctional facility can be found liable for gross negligence and indifference to an inmate's constitutional rights. McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983). However, in order for a

¹ In these instances, the defendants may enjoy qualified immunity. See, Procunier v. Navarette, 434 U.S. 555 (1978).

supervisor to be individually liable under section 1983 to third persons in connection with conduct of subordinates, the former must be personally involved in the unconstitutionality of the latter's conduct. See, Gutierrez v. Rodriguez v. Cartagna, 882 F.2d 553, 562 (1st Cir. 1989). See also, City of Canton, Ohio v. Harris, 489 U.S. 378 (1989). (Deliberate interference by supervisor may be required). The Third Circuit Court of Appeals addressed the issue in Rode v. Dellarciprete, 845 F.2d 1195 (3rd Cir. 1988). Here the court noted: "[a]llegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity." (citations omitted). Id. at 1207. The Third Circuit requires allegations of "personal directives as of actual knowledge and acquiescence in the unconstitutional conduct. Id. Isolated incidents of subordinate misconduct, in the absence of supervisory knowledge, are insufficient for liability. Marchant v. City of Little Rock, Ark., 741 F.2d 201, 204 (8th Cir. 1984); Febus-Rodriguez v. Bethan Court-Lebron, 14 F.3d 87, 92 (1st Cir. 1994). (Supervisor's conduct must amount to a reckless or callous indifference to the constitutional rights of others.)²

Here, we are at preliminary objection stage and Pa.R.Civ.P. 1028 governs. In evaluating the sufficiency of the complaint, this Court is

² In some instances, a subordinate may have the duty to interfere with a co-subordinate in stop violations. However, the violations must occur in the subordinate's presence. Bremer v. Dunaway, 684 F.2d 422 (6th Cir. 1982).

guided by principles similarly applicable to our appellate courts. As the Superior Court stated:

In an appeal from an order sustaining preliminary objections in the nature of a demurrer, this court must accept all material facts set forth in the complaint as well as all inferences reasonably deducible there from as admitted and true and decide whether, based on the facts averred, recovery is impossible as a matter of law. (citations omitted).

Wagner v. Waiplevertch, 774 A.2d 1247, 1250 (Pa.Super. 2001).

As the Superior Court further noted:

The statute (1983) "is not itself a source of substantive rights', but merely provides 'a method of vindicating federal rights elsewhere conferred'". Albright v. Oliver, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994)(quoting Baker v. McCollan, 443 U.S. 137, 144, n.3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)).

Id. at 1251.

Furthermore,

In order to allege a section 1983 claim . . . a plaintiff must allege a deprivation of a right guaranteed by the Constitution or the laws of the United States by a defendant acting under color of law. Tunstall v. Office of Judicial Support of Court of Common Pleas, 820 F.2d 631, 633 (3rd Cir. 1987).

Id.

Generally speaking, a 1981 claim refers to state and private acts of racial discrimination. In this case, the complaint is too broad, and does

not specifically state a claim against any of the defendants under sections 1981 or 1983. Even if the plaintiff can prove that Defendant Rhodes acted as alleged, although reprehensible, this would not implicate a federally protected right. With respect to section 1985, the United States Supreme Court in Griffin v. Breckenridge, 403 U.S. 88 (1971) requires that allegations of a 1985(3) violation be pled to show:

(1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or the privileges or immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Id.

Succinctly stated, the plaintiff must plead a class-based or racial animus. Brawer v. Horowitz, 535 F.2d 830, 840 (3rd Cir. 1976). A section 1986 claim covers those situations where there is a neglect or refusal to prevent conspiracies prohibited by 1985.

After this Court's review, the Court concludes that the plaintiff has not sufficiently pleaded any personal liability claims against any of the defendants. The Court makes this determination not only pursuant to a section 1983 analysis, but also with respect to his sections 1981, 1985 and 1986 claims. The closest he comes is an intentional tort claim

against Defendant Rhodes, but that falls short because he fails to allege the deprivation of a federal right.

3. The effect of the plaintiff's failure to obtain the defendants' consent to file the amended complaint.

The Court agrees with the plaintiff in this regard. In its order of November 15, 2002, the Court ruled that because the Commonwealth did not file a motion to strike the amended complaint, it waived the issue. Therefore, this Court will not grant relief on the grounds that the plaintiff failed to file a request for permission to file his amended complaint.

4. The retaliation claim.

The defendants argue that preliminary objections should be granted because the defendant has failed to sufficiently allege a retaliation claim. The elements of such a cause of action includes (1) that the plaintiff was engaged in constitutionally protected activities; (2) that he was subjected to adverse actions by a state actor; and (3) that the protected activity was a substantial motivating factor in the state actor's decision to take adverse action. See, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Rausser v. Horn, 241 F.3d 330, 333 (3rd Cir. 2001). Once the plaintiff proves these elements, the burden then shifts to the state actor to show that he would have taken the same action without the unconstitutional factors. Id. at 334. In his complaint,

the plaintiff alleges that he received a misconduct on August 24, 2001 for engaging in sexual acts with others. (Complaint ¶15). He asserts that this misconduct was issued in retaliation for filing a grievance.

(Complaint ¶16). Defendants argue that the plaintiff fails to aver the first prong of the retaliation claim, i.e. that he was engaged in a constitutionally protected activity. Defendants focus on the engagement in sexual acts as the predicate. However, the Court reads the complaint differently. The complaint infers that the plaintiff is alleging he was falsely charged with the misconduct surrounding the sexually activity and that this was done in retaliation for his complaining about Defendant Rhodes.

In this regard, the federal courts have held that an inmate's claim that he was falsely charged with institutional misconduct does not state a violation of his constitutional rights. See, Freeman v. Rideout, 808 F.2d 949 (2d Cir. 1986), cert. denied, 45 U.S. 982 (1988); Flanagan v. Shively, 783 F.Supp. 922, 931-32 (M.D. Pa.), aff'd. 980 F.2d 722 (3d Cir. 1992) cert. denied, 510 U.S. 829 (1993); Mitchell v. Horn, 1998 W.L. 695058 (E.D. Pa. 1998). Furthermore, a claim that he was denied due process rights at a misconduct hearing does not state a violation of constitutional rights. See, Sandin v. Conner, 515 U.S. 472, 486 (1995).

Therefore, based upon the above, the Court agrees that the plaintiff has failed to set forth sufficient facts to establish the first element of his retaliation claim against the various defendants.

5. The issue of frivolity.

After its review of the plaintiff's complaint and the applicable case law, this Court concludes that dismissal under 42 Pa.C.S.A. §6602(e)(2) is appropriate because the amended complaint fails to state a claim upon which relief may be granted. Moreover, given the inherent defects in his case, allowing him to file a second amended complaint would be fruitless and a waste of resources.³

DATE: January 7, 2003

BY THE COURT:


Ernest J. DiSantis, Jr., Judge

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³ This Court did not preside over this case at the time that the Plaintiff was afforded *in forma pauperis* status. Therefore, in light of that fact and its ruling on Defendants' preliminary objections, it will not address that issue.