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

BERNARD CARTER JERRY, Plaintiff	)	
vs.	)	Civil Action No. 96-122
	)	Judge Donetta W. Ambrose/
SUPERINTENDENT JAMES PRICE, BEN VARNER, LOU MATT, and C.O. MILLER, Defendants	)	Magistrate Judge Sensenich RE: Doc. No. 11

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MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that the Court grant Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted.

II. REPORT

Plaintiff, Bernard Carter Jerry, an inmate at the State Correctional Institution at Greene ("SCI-Greene"), commenced this action against Superintendent James Price, Ben Varner, Lou Matt and Correctional Officer Miller, pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. He complains that in October 1995 Defendants confined him for three days with an inmate who smokes, in violation of his rights as secured by the Eighth and Fourteenth Amendments of the United States Constitution.

Plaintiff seeks single cell status, a transfer to another state correctional institution, a jury trial, money damages, and any other relief deemed appropriate by this Court.

Plaintiff alleges that on October 20, 1995, inmate Ronald Smith, a smoker, was placed in a cell with him. Plaintiff contends that he advised Defendant Miller of the problems he had being confined with a smoker, and that Defendants Matt, Price and Varner knew or should have known of his problems. He contends that as a result of being confined with a smoking inmate, he began coughing, gagging and having chest pains.

Defendants have filed a Motion to Dismiss this action in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure. They assert that Plaintiff's claim has already been addressed by this Court in Jerry v. Zaborowski, Civ. A. No. 94-1309 (W.D. Pa.) and thus assert that Plaintiff should be precluded from raising this issue a second time by this action.

A review of Civ. A. No. 94-1309 reveals that on October 30, 1995, Plaintiff filed a response to Defendants' Motion for Summary Judgment, raising the claim that inmate Smith had been double-celled with him, that the inmate smoked, and that this smoking caused him to cough and gag. (Copy of Report and Recommendation dated December 7, 1995 attached. See p. 9.) In

Civ. A. No. 94-1309, Defendant Matt submitted an affidavit revealing that inmate Smith's institutional records showed that he was a non-smoker when he was assigned to Plaintiff's cell. (Id). Additionally, the affidavit showed that inmate Smith was removed from Plaintiff's cell on October 23, 1995, three days after being assigned to the cell. Defendants' Motion for Summary Judgment in Civ. A. No. 94-1309 was granted on all claims presented. Plaintiff did not file objections, and the case was closed in December 1995.

In this action, Plaintiff has added the claim that Defendants assigned a smoker to his cell to retaliate against him for "being a whistle blower on defendant perpetrating state sponsored terrorism." (Compl. ¶ C.)

Collateral estoppel, now known as issue preclusion, ensures that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Burlington Northern Railroad Company v. Hyundai Merchant Marine Co., Ltd., 63 F.3d 1227, 1231 (3d Cir. 1995) (quoting Montana v. United States, 440 U.S. 147, 153 (1979)). Collateral estoppel can be used either defensively or

offensively. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4 (1979). The defensive use of collateral estoppel "occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." Id. Defendants have asserted that Plaintiff should be collaterally estopped from pursuing this claim.

Under issue preclusion, a plaintiff is prevented from pursuing an issue where:

> (1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment."

Burlington, 63 F.3d at 1231-32. The party seeking to invoke the doctrine of collateral estoppel bears the burden of establishing its applicability. Amalgamated Cotton Garment v. J.B.C. Co., 608 F. Supp. 158, 163 (E.D. Pa. 1984). Defendants have failed to meet this burden.

Defendants have argued that this Court specifically addressed Plaintiff's claim that he had been double-celled with inmate Smith and found that he had failed to present affirmative evidence that Defendant Zaborowski deprived him of his Eighth

Amendment rights. The Report and Recommendation discussed whether Plaintiff had met both the subjective and objective requirements of Helling v. McKinney, 509 U.S. 25 (1993) for demonstrating a claim for unwilling exposure to second hand smoke. After review of the submitted evidence, the Court found that Plaintiff had failed to meet his burden of proof, and granted Defendant Zaborowski's Motion for Summary Judgment as to Plaintiff's claims for being confined at various times with three different inmates who smoked. (See Report and Recommendation, Civ. A. No. 94-1309.)

By this action, Plaintiff has raised a retaliation claim in connection with his double-celling with inmate Smith which was not addressed in Civ. A. No. 94-1309. To determine whether the Defendants to this action, who were not parties to the prior action, engaged in retaliation against Plaintiff by confining him with a smoker this Court must consider evidence not submitted in the prior lawsuit. Specifically, this Court must consider whether Plaintiff has alleged motive and actions sufficient to demonstrate that he would not have been confined with inmate Smith but for their desire to retaliate against him. Jones v. Coughlin, 696 F. Supp. 916, 920 (S.D.N.Y. 1988). This issue was not addressed in the previous lawsuit. Thus, the first

requirement for invoking issue preclusion has not been satisfied, and accordingly, this action is not barred under the doctrine of collateral estoppel.

Defendants have also argued that this action is frivolous under Deutsch v. United States, 67 F.3d 1080 (3d Cir. 1995), because Plaintiff was confined with inmate Smith for only three days. In Deutsch, the Court of Appeals for the Third Circuit held that a section 1915(d) frivolous dismissal embraces those complaints which are "(1) of little or no weight, value, or importance; (2) not worthy of serious consideration; or (3) trivial." Id. An allegation that prison officials retaliated against an inmate for exercising a constitutional right is actionable under section 1983. White v. Napoleon, 897 F.2d 103, 111-12 (3d Cir. 1990). Here, Plaintiff's allegation that Defendants retaliated against him for his activities as a whistle blower would survive a frivolity analysis because retaliation claims are actionable under section 1983.

Although Plaintiff's complaint survives a frivolous standard, he has nonetheless failed to allege a claim sufficient to survive Defendants' Motion to Dismiss.

A motion to dismiss pursuant to Rule 12(b)(6) cannot be granted unless the court is satisfied "that no relief could be

granted under any set of facts that could be proved consistent with the allegation." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41 (1957). Moreover, a court must employ less stringent standards when considering pro se pleadings than when judging the work product of an attorney. Haines v. Kerner, 404 U.S. 519 (1972). The issue is not whether the plaintiff will prevail at the end but only whether he should be entitled to offer evidence to support his claim. Neitzke v. Williams, 490 U.S. 319 (1989); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The complaint must be read in the light most favorable to the plaintiff and all well-pleaded, material allegations in the complaint must be taken as true. Estelle v. Gamble, 429 U.S. 97 (1976).

As previously noted, to allege a claim for unwilling exposure to second hand smoke, Plaintiff must allege that he was exposed to such an unreasonable level of environmental tobacco smoke that it caused or aggravated a serious medical problem; and he must allege that the prison officials acted with deliberate indifference. Helling v. McKinney, 509 U.S. 25, 35-36 (1993). Absent from Plaintiff's complaint are any claims regarding the level of tobacco smoke to which he was exposed. Further, although Plaintiff complains that the smoke caused him to cough,

gag and have chest pains, he has failed to identify any serious medical condition caused or aggravated by inmate Smith's smoking. Additionally, Plaintiff's allegations that Defendants Matt, Price and Varner "knew or should have known" that he had problems with smokers does not satisfy the subjective standard for alleging deliberate indifference under the Eighth Amendment. Wilson v. Seiter, 501 U.S. 294, 297 (1991). Plaintiff has also failed to allege that Defendant Miller knowingly exposed him to a risk of harm sufficient to allege that he acted with deliberate indifference. Farmer v. Brennan, 114 S.Ct. 1970, 1977 (1994). Thus, Plaintiff has failed to allege facts satisfying either the subjective or objective elements required by Helling to allege an Eighth Amendment claim for unwilling exposure to second hand tobacco smoke.

Plaintiff's claim of retaliation also fails under a motion to dismiss analysis. Plaintiff has alleged that Defendants Matt, Price and Varner "knew or should have known plaintiff was having problems with smokers in the prison they jointly control, but flagrantly discriminated and retaliated against plaintiff for being a whistle blower on defendants perpetrating state sponsored terrorism." (Compl. ¶ C.) To allege a claim for retaliation, plaintiff must allege more than

retaliation because he exercised a constitutional right, "he must also allege that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals." Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). Plaintiff has failed to allege that he would not have been assigned to a cell with inmate Smith but for his whistle blower activities. Jones v. Coughlin, 696 F. Supp. 916, 920 (S.D.N.Y. 1988). He has not alleged that Defendants lacked a legitimate penalogical purpose for celling him with inmate Smith. Additionally, he has not specified whether his activities as a "whistle blower" involved inmate grievances or communications with a court. Although the latter is protected by the First and Fourteenth Amendments, Bounds v. Smith, 430 U.S. 817, 821 (1977); Peterkin v. Jeffes, 855 F.2d 1021, 1036 (3d Cir. 1988), Plaintiff does not have a constitutional right to file inmate grievances. Hoover v. Watson, 886 F. Supp. 410, 418 (D. Del. 1995). Plaintiff has failed to allege that his whistle blower activities involved a protected constitutional right. Thus, he has failed to allege a claim for retaliation because he has not alleged a protected constitutional interest and he has not alleged that

Defendants lacked a valid, penalogical purpose for his cell assignment.

In light of Plaintiff's failure to allege a claim under the Eighth Amendment or to allege a claim for retaliation, it is recommended that Defendants' Motion to Dismiss be granted.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation.

ILA JEANNE SENSENICH
U.S. Magistrate Judge

Dated: October 7, 1996

cc: The Honorable Donetta W. Ambrose
United States District Judge

Bernard Carter Jerry, AP-3307
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CASE CLOSED

BERNARD CARTER JERRY, Plaintiff	)	
vs.	)	Civil Action No. 96-122 Judge Donetta W. Ambrose/ Magistrate Judge Sensenich Re: Doc. # 11
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MEMORANDUM ORDER

Plaintiff's complaint was received by the Clerk of Court on October 27, 1995, and was referred to United States Magistrate Judge Ila Jeanne Sensenich for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on October 7, 1996, recommended that the Court grant Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on Plaintiff by delivery to the State Correctional Institution at Greene, where he is incarcerated and on Defendants. Objections were filed by Plaintiff on October 17, 1996. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 4th day of November, 1996;

AO 72A
(Rev. 8/82)

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is granted.

AND IT IS FURTHER ORDERED that pursuant to Rule 4(a)(1) of the F.R.App.P., that if you desire to appeal from this Order, you must do so within thirty (30) days by filing a notice of appeal as provided by Rule 3 F.R.App.P. and if you desire to prosecute that appeal in forma pauperis, you must also submit a motion for leave to proceed on appeal in forma pauperis, as well as an affidavit which includes a statement of all assets you possess as well as a certified copy of your inmate trust fund account statement for the six month period immediately preceding the filing of your notice of appeal.

The report and recommendation of Magistrate Judge Sensenich, dated October 7, 1996, is adopted as the opinion of the court.

Donetta W. Ambrose
United States District Judge

cc: Ila Jeanne Sensenich
U.S. Magistrate Judge

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