

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

FILED
WILLIAMSPORT, PA
JUN 30 2000
MARY E. D'ANDREA, CLERK
Per Deputy Clerk

FREDERICK RAY,

Plaintiff

: No. 4:CV-00-0197

vs.

: (Complaint Filed 02/03/00)

LT. FAUST, ET AL.,

: (Judge Muir)

Defendants

: (Magistrate Judge Durkin)

ORDER

June 30, 2000

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 3, 2000, Frederick Ray was an inmate at the State Correctional Institution in Dallas, Pennsylvania. On that date he filed this civil rights action pursuant to 42 U.S.C. §1983 in which he alleges various violations of his constitutional rights. The originally named Defendants Lieutenant Faust, Captain Markley, Superintendent Frederick K. Frank, and Chief Hearing Officer Robert S. Bitner. The Defendants are officers and officials employed at the State Correctional Institution in Dallas, Pennsylvania.

The Clerk of Court assigned responsibility for this case to us but referred it to United States Magistrate Judge Raymond J. Durkin for preliminary consideration.

On March 20, 2000, the Defendants filed a motion to dismiss Ray's complaint. On March 21, 2000, they filed a brief and other

documents in support of that motion. Although Ray received two extensions of time to respond, to this date he has not filed a brief in opposition to the Defendants' motion to dismiss.

On June 5, 2000, after not receiving any brief in opposition from Ray, Magistrate Judge Durkin issued a report recommending it be granted. The Magistrate Judge reviewed the merits of the motion despite the fact that Ray has not filed any document in opposition to the motion. The time allowed for the parties to file objections to that report and recommendation expired on June 20, 2000, and none were filed. The matter is ripe for disposition.

When no objections are filed to the report of a Magistrate Judge, we need only review that report as we in our discretion deem appropriate. *Thomas vs. Arn*, 474 U.S. 145, 151-52 (1985). Our review of Ray's complaint and the Defendants' motion convinces us that Ray has failed to state a claim upon which relief can be granted. He can prove no set of facts supporting his allegations which would entitle him to relief.

We find no error in the Magistrate Judge's report and we agree with his recommendations. Therefore, we will adopt the report and recommendation of Magistrate Judge Durkin *in toto*.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Report and recommendation of Magistrate Judge Durkin (Document 23) is adopted *in toto*.

2. Defendants' motion to dismiss Ray's complaint (Document 9) is granted.
3. The Clerk of Court shall send a copy of this order to Magistrate Judge Durkin.
4. The Clerk of Court shall close this file.



MUIR, U.S. District Judge

MM:ga

Robert M. Wolff, Esq.
PA Department of Corrections
Office of Chief Counsel
55 Utley Drive
Camp Hill, PA 17011-8028

Re: 4:00-cv-00197

Please file all pleadings directly with the Clerk's Office in which the assigned Judge is located. Do not file any courtesy copies with the Judge's Chambers.

JUDICIAL OFFICERS:

Judge Sylvia H. Rambo
Judge Yvette Kane
Judge William W. Caldwell
Magistrate Judge J. Andrew Smyser

CLERK'S OFFICE ADDRESS:

U.S. District Court
228 Walnut Street
P.O. Box 983
Harrisburg, PA 17108

Chief Judge Thomas I. Vanaskie
Judge A. Richard Caputo
Judge James M. Munley
Judge William J. Nealon
Judge Richard P. Conaboy
Judge Edwin M. Kosik
Magistrate Judge Raymond J. Durkin
Magistrate Judge Thomas M. Blewitt

U.S. District Court
235 N. Washington Ave
P.O. Box 1148
Scranton, PA 18501

Judge James F. McClure
Judge Malcolm Muir

U.S. District Court
240 West Third Street
Suite 218
Williamsport, PA 17701

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

FREDERICK T. RAY, : CIVIL ACTION NO. 00-0197
Plaintiff : (MUIR, J.)
v. : (DURKIN, M.J.)
DIANA G. BANEY, et al.,
Defendants

FILED
SCRANTON
JUN - 5 2000
PER _____
DEPUTY CLERK

REPORT AND RECOMMENDATION

Presently pending before the court is the defendants' motion to dismiss the plaintiff's complaint. (Doc. No. 9).

The plaintiff, a former inmate at the State Correctional Institution, Huntingdon, ("SCI-Huntingdon"), Pennsylvania¹, filed this civil rights action pursuant to 42 U.S.C. § 1983, in which he alleges a violation of his constitutional rights. (Doc. No. 1).

Named as defendants to this action are Lieutenant Faust, Captain Markley, Superintendent Frederick K. Frank, and Chief Hearing Officer Robert S. Bitner.

On February 2, 2000, the plaintiff filed the appropriate application to proceed in forma pauperis and authorization forms. (Doc. Nos. 2 & 3). An administrative order was issued on the same day. (Doc. No. 4).

By order dated February 14, 2000, it was directed that process issue. (Doc. No. 6).

On March 20, 2000, the defendants filed the instant motion to

¹By letter dated May 4, 2000, the plaintiff informed the court that he has been released from incarceration and is currently residing at 80 Meadowlake Drive, Downingtown, Pennsylvania 19335. (Doc. No. 21).

dismiss the plaintiff's complaint. (Doc. No. 9). On March 21, 2000, the defendants filed a brief and appendix² in support of their motion to dismiss. (Doc. Nos. 10 & 11). Although the plaintiff requested and was granted two (2) extensions of time to file a brief in opposition to the defendants' motion, (See Doc. Nos. 16 & 20), the last until May 5, 2000, as of the date of this report the plaintiff has failed to either file his brief in opposition to the defendants' motion or request an additional extension of time within which to do so. Thus, the plaintiff has failed to properly oppose the defendants' motion.

It is noted, however, that the defendants' motion is well-

²The defendants have submitted materials outside of the pleadings for consideration in conjunction with their motion to dismiss. These materials include a Pennsylvania Department of Corrections, Executive Menu Systems Transfer Inquiry Report and documents relating to a grievance filed by the plaintiff challenging the conditions of his confinement while at SCI-Huntingdon. (Doc. No. 11).

When materials outside of the pleadings are considered in conjunction with a motion to dismiss, the motion is more properly construed as a motion for summary judgment. See Laughlin v. Metropolitan Washington Airports, 149 F.3d 253, 260-61 (4th Cir. 1998) (when matters outside pleadings are presented to and not excluded by the court, motion to dismiss must be treated as one for summary judgment); Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993) (when matters outside of the pleadings are considered, claim converted into motion for summary judgment). As such, if the court were to consider the extraneous materials submitted by defendants, the plaintiff would be entitled to notice that the court is construing the motion as one for summary judgment and be given additional time to respond to the motion as such.

However, in this case, the plaintiff's complaint can be dismissed for his failure to state a claim upon which relief may be granted without considering the materials submitted by the defendants. Thus, the defendants' motion will not be construed as a motion for summary judgment and notice to the plaintiff is not necessary.

taken. The plaintiff alleges in his complaint that on August 9, 1999, defendant Markley approached his cell in the Restricted Housing Unit, ("RHU"), with a "cell extraction team" and ordered the plaintiff to follow him to the "D-Block", a psychiatric observation unit. (Doc. No. 1, Attachment, ¶¶ 4-6).

Plaintiff alleges that the "D-Block" was then under construction due to numerous code violations which made the Block uninhabitable. (Id. at ¶ 7). Despite this, the plaintiff alleges that he was placed in the "D-Block" for forty-three (43) days, during which he alleges that his cell "was extremely filthy, unsanitary rusty drinking water, infested with vermin, toilet encrusted with urine, feces, gnats and flies, excessive dust, no ventilation, unsanitary mite infested foam mattress, no linen or pillow". (Id. at ¶¶ 9-10). Plaintiff alleges that as a result of living in such conditions, he contracted a skin disease called "cellulitis"³. (Id. at ¶ 20).

The plaintiff alleges that defendants Faust and Markley were aware of the conditions of the plaintiff's confinement, but did nothing in retaliation for the plaintiff filing grievances and assisting others with filing grievances and lawsuits against various staff members at SCI-Huntingdon. (Id. at ¶¶ 11-12, 14).

³Cellulitis is a bacterial skin infection caused by bacteria entering a break in the skin and growing, causing an infection and tissue reaction to injury. Risk factors for cellulitis include insect bites and stings, animal or human bites; injury or trauma with a break in the skin; history of peripheral vascular disease, diabetes mellitus, or ischemic ulcers; recent cardiovascular, pulmonary (lung), dental, or other procedures; and use of immunosuppressive or corticosteroid medications. See Cellulitis, Adam.com/ency/article/000855.htm.

The plaintiff alleges that his confinement in the "D-Block" denied him access to the courts because he did not have access to the law library and had to file for extensions of time to meet filing deadlines. (Id. at ¶ 19).

According to the plaintiff, he filed a grievance with respect to the conditions in the "D-Block", but his grievance was denied, as were his appeals to defendants Frank and Bitner. (Id. at ¶¶ 15-18).

As a result of the above allegations, the plaintiff alleges that he suffered violations of his Eighth and Fourteenth Amendment rights. (Id. at ¶¶ 21-23).

In an action brought pursuant to 42 U.S.C. § 1983, a plaintiff must allege and prove that the defendants deprived him of a right secured by the Constitution and laws of the United States. Maine v. Thiboutot, 448 U.S. 1 (1980). Liability under § 1983 is personal in nature and can only follow personal involvement in the alleged wrongful conduct shown through specific allegations of personal direction or of actual knowledge and acquiescence. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Moreover, relief cannot be granted against a defendant pursuant to § 1983 based solely on a theory of respondeat superior or the fact that the defendant was the supervisor or superior of the person whose conduct actually deprived the plaintiff of one of his federally protected rights under color of state law. Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976); Goode v. Rizzo, 506 F.2d 542, 550 (3d Cir. 1974), rev'd on other grounds, Rizzo v.

Goode, 423 U.S. 362, 96 S.Ct. 598 (1976).

With respect to the instant action, the only allegations against defendants Frank and Bitner are that they denied the plaintiff's appeals from the denial of his grievance concerning the conditions of his confinement.

With respect to these allegations, it has previously been held that there is no due process right implicated by an inmate's institutional grievance and the response to or lack thereof by prison officials. See Wilson v. Horn, 971 F.Supp. 943, 947 (E.D.Pa. 1997) aff'd, 142 F.3d 403 (3d Cir. 1998); Jones v. Oldt, 971 F.Supp.2d 491, 496 (E.D.Pa. 1998); Flanagan v. Warden, United States Penitentiary, 784 F.Supp. 178, 181 (M.D.Pa. 1992).

Since the plaintiff has no constitutional right to petition the inmate grievance system or to receive a response to a grievance, the fact that defendants Frank and Bitner denied his appeals does not give rise to a constitutional claim, and the plaintiff's complaint should be dismissed with respect to these defendants.

Moreover, the only allegations against defendant Markley in the plaintiff's complaint are that he escorted the plaintiff to his cell in the "D-Block" and that the plaintiff "believes" that defendant Markley did not help him in retaliation for the plaintiff filing grievances and assisting others in doing so. These allegations are insufficient to state a claim against defendant Markley.

Initially, the fact that defendant Markley escorted the

plaintiff to his cell in the "D-Block" is not sufficient to show any personal involvement by defendant Markley in a violation of the plaintiff's constitutional rights.

Furthermore, to the extent that the plaintiff alleges that he "believes" that defendant Markley did not help him in retaliation for his filing grievances and for helping others to do so, in bringing an action for retaliation, an inmate faces "a substantial burden in attempting to prove that the actual motivating factor . . . was as he alleges." McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979). He must prove that the action taken against him would not have occurred "but for" the alleged reason. Id. See Mount Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 285-87 (1977). Where there is an independent basis for the defendant's actions no claim may be asserted. Willis v. Ciccone, 506 F.2d 1011, 1019 (8th Cir. 1974). Similarly, the plaintiff must prove the retaliatory motive by specific evidence and may not rely on conclusory statements. Flaherty v. Coughlin, 713 F.2d 10, 13 (2d Cir. 1985).

In this case, the plaintiff has adduced no factual allegations indicating that defendant Markley's conduct was prompted by the fact that the plaintiff had filed grievances or helped others to do so. In fact, the plaintiff only alleges that he "believes" this to be the case. Since the plaintiff does no more than to present conclusory allegations of retaliation, the defendant's motion to dismiss should be granted with respect to this claim.

Finally, with respect to defendant Faust, the plaintiff alleges that he "had exclusive jurisdiction over plaintiff's

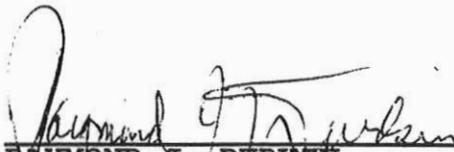
conditions of confinement, had personal knowledge of his conditions and failed to rectify them". Again, the plaintiff alleges that he "believes" that defendant Faust did so in retaliation for the plaintiff's filing grievances and assisting others in doing so. For the reasons set forth above, the plaintiff's claim against defendant Faust for retaliation should be dismissed.

Moreover, to the extent that the plaintiff is attempting to hold defendant Faust liable on a theory of respondeat superior, the plaintiff's complaint against defendant Faust should be dismissed.

On the basis of the foregoing,

IT IS RESPECTFULLY RECOMMENDED THAT:

the defendants' motion to dismiss the plaintiff's complaint, (Doc. No. 9), be granted.


RAYMOND J. DURKIN
United States Magistrate Judge

Dated: June 5, 2000

Robert M. Wolff, Esq.
PA Department of Corrections
Office of Chief Counsel
55 Utley Drive
Camp Hill, PA 17011-8028

Re: 4:00-cv-00197

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JUDICIAL OFFICERS:

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Defendants

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PER _____
DEPUTY CLERK

N O T I C E

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NOTICE IS HEREBY GIVEN that the undersigned has entered
the following: Report and Recommendation of Magistrate
Judge Durkin dated 06/05/00.

Any party may obtain a review of the magistrate judge's above
proposed determination pursuant to Rule 72.3, M.D.PA, which
provides: 72.3 REVIEW OF REPORTS AND RECOMMENDATIONS OF
MAGISTRATE JUDGES ADDRESSING CASE DISPOSITIVE
MOTIONS

Any party may object to a magistrate judge's proposed
findings, recommendations or report addressing a motion or matter
described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation
for the disposition of a prisoner case or a habeas corpus petition
within ten (10) days after being served with a copy thereof. Such

party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall made a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.


RAYMOND J. DURKIN
United States Magistrate Judge

Dated: June 5, 2000

