

I. Allegations in Complaint

On December 6, 2003, at SCI-Dallas, an inmate named Curry assaulted Correctional Officer Tucker. (Doc. 1, Compl. at 2; Ex. 1a.) On December 10, 2003, Plaintiff was summoned to the control gate for questioning with regard to the incident. Specifically, Defendant Cywinski was there to question him with respect to statements Plaintiff was alleged to have made regarding the assault.² Plaintiff refused to answer any of the questions asked by Cywinski, and invoked the Fifth Amendment right to remain silent. Plaintiff alleges that he was thereafter placed in handcuffs and “pulled” by Cywinski down the hallway. Because it seemed like Cywinski might “pull or push him down the steps,” Plaintiff states that he pulled back away from Cywinski, thereby injuring his own calf muscle. (*Id.* at 2.) Defendant told Plaintiff that if he reported what happened, he would “come up missing.” (*Id.*) Plaintiff claims that Cywinski thereafter filed a false misconduct report against him in retaliation for Plaintiff refusing to answer questions regarding the assault, and placed him in the RHU claiming it was because an investigation was ongoing and Plaintiff had made “inappropriate statements concerning the C/O Tucker assault.”

Plaintiff states that after arriving at the RHU on K Block, he was placed in an “empty cage” for about two hours. When he requested to use the bathroom he states that correctional officers who were “sitting around” ignored him. When Plaintiff urinated on himself, Defendant “Unknown Lieutenant” ordered him to strip to be processed into the RHU. Plaintiff contends that the Defendant’s actions were in retaliation for his failure to answer Cywinski’s questions earlier in the day regarding the assault.

It is also alleged that Defendant Cwalina and two confidential informants conspired on

² From the pleadings submitted, it also appears that Defendant Cwalina was present for the questioning.

December 20, 2003, by issuing a "racial misconduct report" in retaliation for Plaintiff's asserting his right to remain silent and refusing to answer questions on December 10, 2003 regarding the assault. (Doc. 1, Compl. ¶ 8; Exs. 3a, 4a.) Plaintiff attaches the misconduct report which reveals that while being questioned, Plaintiff refused to cooperate and became belligerent and hostile. The misconduct report also contains confirmation from the confidential informants that Plaintiff made threatening comments regarding his belief that other correctional officers should be assaulted like Officer Tucker. (Id., 3a-4a Misconduct Report dated 12/20/03.)

A hearing on this misconduct was conducted on December 22, 2003 before Defendant McKeown, Hearing Examiner. Plaintiff alleges that McKeown violated his due process rights when he failed to conduct an in camera hearing to determine the reliability of the informants. While he does acknowledge that McKeown conducted an in camera hearing regarding the informants, he contends that he only addressed whether the informants were "credible" as opposed to "reliable." Plaintiff was ultimately found guilty of threatening an employee or their family with bodily harm and lying to an employee, and sanctioned to 90 days disciplinary custody and removal from his job. (Doc. 1, Compl., Ex. 6a-7a, Hearing Report.)

Plaintiff further contends that Defendants Kneiss, Demming and Jones violated his rights by conspiring to fabricate information in his prison file. In particular, he claims they stated that he received disciplinary time for causing a disturbance on a unit whereby an officer was assaulted. (Doc. 1, Compl., Ex. 8a.) As a result of this information, Plaintiff states he was transferred to SCI-Greene where he is punished and retaliated against.³ Based on all of the foregoing allegations, Plaintiff seeks declaratory, injunctive, compensatory and punitive relief.

³ Plaintiff does not name any individuals from SCI-Greene as defendants in this action.

On May 16, 2006, Defendants filed a motion to dismiss the complaint.⁴ (Doc. 14.) A brief in support of the motion was filed on the same date. (Doc. 15.) Plaintiff has filed his opposition to the motion (Docs. 17, 18), and the matter is now ripe for consideration.

II. Motion to Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) allows a defendant, in response to a complaint, to file a motion to dismiss a complaint for "failure to state a claim upon which relief can be granted" A motion to dismiss should not be granted if "under any reasonable reading of the pleadings, the plaintiff [] may be entitled to relief" Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). In making that decision, the court must accept as true all well-pleaded allegations in the complaint, Maio v. Aetna, Inc., 221 F.3d 472, 481-82 (3d Cir. 2000), and construe any reasonable inferences to be drawn from them in the plaintiff's favor. See United States v. Occidental Chemical Corp., 200 F.3d 143, 147 (3d Cir. 1999). Consequently, the court need not accept "bald assertions" or "legal conclusions." Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). Likewise, the court need not "conjure up unpled allegations or contrive elaborately arcane scripts" in order to breathe life into an otherwise defective complaint. Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988). A complaint that sets forth facts which affirmatively demonstrate that the plaintiff has no right to recover is properly dismissed without leave to amend. Grayson v. Mayview State Hospital, 293 F.3d 103, 106 (3d Cir. 2002); Estelle v. Gamble, 429 U.S. 97, 107-08 (1976).

III. Discussion

⁴ The motion to dismiss was filed on behalf of Defendants Cywinski, Cwalina, McKeown, Kneiss, Demming and Jones. The remaining three defendants, two confidential informants and an unknown Lieutenant have never been identified by Plaintiff even though service was never effected upon them and this action was commenced almost one year ago. Because even if Plaintiff could identify these individuals he still fails to state a claim against them, they will be dismissed from this action for the reasons set forth in the instant Memorandum.

A. Claims against Cywinski

Plaintiff alleges claims of excessive force, threats and retaliation against Lieutenant Cywinski. In evaluating a claim of excessive use of force, the court must take several factors into consideration, such as: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of injury inflicted; (4) the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them; and (5) any efforts made to temper the severity of a forceful response. Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2000); Whitley v. Albers, 475 U.S. 312, 321 (1986). Consistent with this standard, not all tortious conduct which occurs in prison rises to the level of an Eighth Amendment violation. The constitutional protection is nowhere nearly so extensive as that afforded by the common law battery, which makes actionable any intentional and unpermitted contact with the plaintiff's person. Although "the least touching of another in anger is a battery, ... it is not a violation of a constitutional right actionable under 42 U.S.C. § 1983. ... Not every push or shove, even if it later may seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). Indeed, "there is no constitutional violation for 'de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.'" Brooks, 204 F.3d at 107 (quoting Hudson v. McMillian, 503 U.S. 1, 9-10 (1992)). The "use of wanton, unnecessary force resulting in severe pain," however, is actionable. Id. at 106.

In the instant case, it was after Plaintiff refused to cooperate with Cywinski's questioning when he was handcuffed and "pulled" that Plaintiff admits to pulling back away from Cywinski because he "believed" he may be pushed or pulled down stairs. It was when Plaintiff resisted being escorted down the hall that he admits injuring himself by straining his right calf muscle in the

process. Even accepting all of Plaintiff's assertions as true, the complaint is simply lacking in any allegations that Cywinski applied any kind of wanton, unnecessary force to Plaintiff in a malicious, sadistic manner to cause him harm.

Plaintiff's claim that Cywinski threatened him not to report what happened also does not rise to the level of a constitutional violation. It has been held that the use of words, however violent, generally cannot constitute an actionable assault. See Maclean v. Secor, 876 F. Supp. 695, 698-99 (E.D. Pa. 1995); Murray v. Woodburn, 809 F. Supp. 383, 384 (E.D. Pa. 1993) ("Mean harassment . . . is insufficient to state a constitutional deprivation."); Prisoners' Legal Ass'n v. Roberson, 822 F. Supp. 185, 189 (D.N.J. 1993) ("Verbal harassment does not give rise to a constitutional violation enforceable under § 1983"). Mere threatening language and gestures of a custodial officer do not, even if true, amount to constitutional violations. Fisher v. Woodson, 373 F. Supp. 970, 973 (E.D. Va. 1973); see also Balliet v. Whitmire, 626 F. Supp. 218, 228-29 (M.D. Pa.) ("[v]erbal abuse is not a civil rights violation . . ."), aff'd 800 F.2d 1130 (3d Cir. 1986). Further, it has also been held that a constitutional claim based only on verbal threats will fail regardless of whether it is asserted under the Eighth Amendment's cruel and unusual punishment clause, see Prisoners' Legal Ass'n, 822 F. Supp. 189, or under the Fifth Amendment's substantive due process clause, see Pittsley v. Warish, 927 F.2d 3, 7 (1st Cir.), cert. denied, 502 U.S. 879 (1991).

The court also finds that Plaintiff fails to state a claim of retaliation against Cywinski. A prisoner alleging retaliation must show "(1) constitutionally protected conduct, (2) an adverse action by prison officials 'sufficient to deter a person of ordinary firmness from exercising his [constitutional] rights,' and (3) a causal link between the exercise of his constitutional rights and the adverse action taken against him." Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003) (quoting Allah v. Seiverling, 229 F.3d 220, 225 (3d Cir. 2000)). Even if a prisoner has sufficiently alleged a causal

connection, prison officials can overcome this element by demonstrating that the same action would have been taken in the absence of the protected activity. Rauser v. Horn, 241 F.3d 330, 333-34 (3d Cir. 2001).

Plaintiff claims he was issued a false misconduct in retaliation for remaining silent when questioned about the assault incident. His retaliation claim fails in that he does not allege he was engaged in constitutionally protected activity. While Plaintiff attempts to twist his refusal to answer questions into an argument that he was invoking his constitutional right not to incriminate himself, his argument is not well taken. Any resulting prison sanctions which could have resulted to Plaintiff would not have been criminal in nature. It is well established that prison disciplinary proceedings are not part of a criminal prosecution. See Wolff v. McDonnell, 418 U.S. 539, 556 (1974). As such, Plaintiff fails to demonstrate that he was engaged in constitutionally protected activity when he refused to cooperate, and therefore fails to state a claim for retaliation against Cywinski.

He also does not set forth a claim with regard to his placement in the RHU. To set forth an Eighth Amendment violation, the alleged deprivation must impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Connor, 515 U.S. 472 (1995). The complaint fails to set forth any allegations of atypical and significant hardship associated with being confined in the RHU. The mere fact that an inmate is placed in the RHU alone does not establish a violation. See Smith v. Mensinger, 293 F.3d 641, 652-54 (3d Cir. 2002). Even confinement for a period of fifteen (15) months has been found not to violate the constitution. See Griffin v. Vaughn, 112 F.3d 703, 706-08 (3d Cir. 1997). The only claim Plaintiff includes in the complaint is that his request to use the bathroom was ignored and as a result he urinated on himself. This allegation, even if true, falls short of "atypical and significant." While Plaintiff certainly disagrees with his placement in the RHU, he has failed to plead the requisite conditions implicating a

liberty interest protected by the Due Process Clause. While his conditions may have been less amenable and more restrictive than general population, there is no indication that they were not within the parameters of the sentence imposed upon him or otherwise in violation of the Constitution.

B. Claims against Cwalina

Plaintiff contends that Cwalina and two confidential informants conspired against him to fabricate a racial misconduct because Plaintiff refused to answer questions on December 10, 2003 regarding the assault incident as discussed above. For the same reasons previously set forth, the court finds that Plaintiff has failed to state a claim of retaliation. He fares no better with regard to his conspiracy claim. In order to set forth a conspiracy claim pursuant to 42 U.S.C. § 1985, five (5) elements must be alleged: (1) a conspiracy by the defendants, (2) designed to deprive a plaintiff of the equal protections of the laws, (3) the commission of an overt act in furtherance of that conspiracy, (4) a resultant injury to person or property or a deprivation of any right or privilege of citizens, and (5) defendant's actions were motivated by racial or otherwise class-based invidiously discriminatory animus. United Brotherhood of Carpenters, Local 610 v. Scott, 463 U.S. 825, 830 (1983).

In order to set forth a conspiracy claim, a plaintiff cannot rely on broad or conclusory allegations. D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1377 (3d Cir. 1992), cert. denied, 506 U.S. 1079 (1993); Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989); Durre v. Dempsey, 869 F.2d 543, 545 (10th Cir. 1989). The Court of Appeals for the Third Circuit has further noted that "[a] conspiracy claim must . . . contain supportive factual allegations." Rose, 871 F.2d at 366. Moreover, "[t]o plead conspiracy adequately, a plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the

alleged conspirators taken to achieve that purpose.” Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166 (3d Cir. 1989).

The essence of a conspiracy is an agreement or concerted action between individuals. See D.R. by L.R., 972 F.2d at 1377; Durre, 869 F.2d at 545. Consequently, a plaintiff must allege with particularity and present facts which show that the purported conspirators reached some understanding or agreement or plotted, planned and conspired together to deprive plaintiff of a protected federal right. Id.; Rose, 871 F.2d at 366; Young, 926 F.2d at 1405 n. 16; Chicarelli v. Plymouth Garden Apartments, 551 F. Supp. 532, 539 (E.D. Pa. 1982). Where a civil rights conspiracy is alleged, there must be some specific facts in the complaint which tend to show a meeting of the minds and some type of concerted activity. Deck v. Leftridge, 771 F.2d at 1168, 1170 (8th Cir. 1985). A plaintiff cannot rely on subjective suspicions and unsupported speculation. Young v. Kann, 926 F.2d 1396, 1405 n.16 (3d Cir. 1991).

Plaintiff's complaint is totally lacking on all fronts. He sets forth nothing more than conclusory allegations insufficient to state a claim of conspiracy against Defendants. There are no facts asserted which even suggest any specific plan or agreement by Defendants. Further, while Plaintiff vaguely labels the misconduct he received as “racial,” he fails to allege any facts demonstrating racial or class-based discriminatory actions taken by Defendants. As such, this claim is subject to dismissal.

C. Claims against McKeown

Plaintiff avers that Defendant McKeown, Hearing Examiner, violated his due process rights during the course of the misconduct hearing. He specifically challenges McKeown's alleged failure to conduct an in camera hearing with the confidential informants to determine whether they were reliable. In Wolff v. McDonnell, 418 U.S. 539, 556 (1974), the Supreme Court set forth the

requirements of due process in prison disciplinary hearings. Adequate due process protections are afforded prisoners who may lose good-time credits as a result of disciplinary sanctions when they are given: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. Superintendent v. Hill, 472 U.S. 445, 454 (1985). In addition, a disciplinary decision implicating a prisoner's liberty interest must be supported by at least "some evidence." Hill, 472 U.S. at 455.

In the instant case, Plaintiff does not contend that any of the above due process protections were not afforded to him. Rather, he argues that pursuant to DC-ADM 801, McKeown was required to conduct an in camera hearing to determine whether the confidential informants were reliable. He does not, however, dispute that an in camera hearing was held by McKeown with the informants on December 22, 2003. Rather, he argues that McKeown made a determination as to the informants' credibility as opposed to reliability. For the following reasons, the court finds that no due process claim is stated.

First, an agency's failure to follow its own regulations is not per se a violation of due process. See Flanagan v. Shively, 783 F. Supp. 922, 931 (M.D. Pa. 1992), aff'd 980 F.2d 722 (3d Cir. 1992), cert. denied, 510 U.S. 829 (1993); Tochin v. Supreme Ct. of the State of New Jersey, 111 F.3d 1099, 1115 (3d Cir. 1997). Further, Plaintiff does not argue he did not receive notice of the charges, a statement identifying the evidence relied on and the reason for the disciplinary action taken, and an opportunity to present evidence and call witnesses. Most importantly, the basis of his entire challenge to the actions taken by the Hearing Examiner is the distinction between "reliability" and "credibility". There is no question that an in camera review was conducted by McKeown with

regard to determining the trustworthiness of the confidential informants. Regardless of whether McKeown made a finding labeled as "credible" or "reliable," the ultimate determination was their believability/reliability. As such, Plaintiff's due process challenge fails to state a claim.

D. Claims against Kneiss, Jones and Demming

Plaintiff also raises claims of conspiracy against Defendants Kneiss, Jones and Demming, who were members of the Program Review Committee that recommended Plaintiff for a transfer following his misconduct hearing. Plaintiff generally asserts that these individuals conspired to place false information in his prison record which served as the basis for his transfer to the SuperMax Unit at SCI-Greene. First, based upon the principles set forth above, Plaintiff's wholly conclusory allegations fail to state a claim of conspiracy. Further, the statement in his record challenged by Plaintiff was the reference to him as "... an individual who received disciplinary time for causing a disturbance on the unit whereby an officer was assaulted. (Doc. 1, Compl., Ex. 8a.) There is no question that Plaintiff was found guilty of making inflammatory statements to other inmates regarding the assault on Correctional Officer Tucker and attempting to encourage further assaults. Finally, Plaintiff has no reasonable expectation to be incarcerated in a particular prison. See Olim v. Wakinekona, 461 U.S. 238 245 (1983). Accordingly, he also fails to state a claim against these Defendants. An appropriate Order follows.

