

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BRUCE A. BENSINGER	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 99-4689
SERGEANT BROWN, SERGEANT	:	
MARTIN AND WARDEN GEORGE	:	
WAGNER	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

April 6, 2000

Presently before the Court is the Plaintiff's Motion to Dismiss. For the reasons stated below, the Motion is Denied.

I. BACKGROUND

Plaintiff Bruce A. Bensinger ("Plaintiff") filed a civil rights action under 42 U.S.C. § 1983 on December 9, 1999. Plaintiff alleges that Defendants Sergeant Brown, Sergeant Martin and Warden George Wagner ("Defendants") violated his rights protected by the Eighth Amendment to the U.S. Constitution. Plaintiff claims that the Defendants ignored his warnings that inmates would get hurt if corrections officer were not placed on duty within the law library at SCI-Graterford. On May 28, 1999, several weeks after his "warning" to the Defendants, a fellow inmate assaulted Plaintiff in the law library.

II. LEGAL STANDARD

When deciding to dismiss a claim pursuant to Rule 12(b)(6) a court must consider the legal sufficiency of the complaint and dismissal is appropriate only if it is clear that "beyond a doubt ... the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCann v. Catholic Health Initiative, 1998 WL 575259 at *1 (E.D. Pa. Sep. 8, 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court assumes the truth of plaintiff's allegations, and draws all favorable inferences therefrom. See, Rocks v. City of Philadelphia, 868 F.2d. 644, 645 (3d. Cir. 1989). However, conclusory allegations that fail to give a defendant notice of the material elements of a claim are insufficient. See Sterling v. SEPTA, 897 F.Supp. 893, 895 (E.D. Pa.1995). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). The Court must determine whether, under any reasonable reading of the pleadings, the law allows the plaintiff a remedy. See, Nami v. Fauver, 82 F.3d 63, 65 (3d. Cir. 1996). While a *pro se* complaint must be liberally construed and held to a less stringent standard than formal pleadings drafted by lawyers, that standard applies only to the *pro se* plaintiff's factual allegations, and not to his legal theories. See Nietzke v. Williams, 490 U.S. 319, 330 n. 9 (1989).

III. DISCUSSION

A. Proceeding in forma pauperis

As a threshold matter, the Court must decide whether the Plaintiff is entitled to bring this action *in forma pauperis* under 28 U.S.C. § 1915. It would be an understatement to say that Plaintiff has been a frequent litigant in this Court. At most recent count, the Plaintiff has

filed over 50 actions in this district within the last ten years. Many of these claims have been dismissed as frivolous or for failure to state a claim. Under the Prison Litigation Reform Act of 1996 (“PLRA”), an inmate is no longer allowed to bring an action *in forma pauperis* if he has previously filed three actions, while incarcerated, that have been dismissed as frivolous, malicious or for failure to state a claim. See 28 U.S.C. § 1915(g). However, an inmate can avoid this so-called “three-strike” rule of the PLRA if the plaintiff is in imminent danger of serious physical harm. Id. The Third Circuit has held that allegations of imminent danger of serious physical harm must be accepted by the Court unless the allegation is challenged by the Defendant. See Gibbs v. Roman, 116 F.3d. 83, 86 (3d Cir. 1997). If the Defendant challenges the imminent danger allegation, then the Court must determine whether the plaintiff’s allegation of imminent danger is credible as of the time of the incident. Id.

Whether Plaintiff has alleged being in imminent danger of serious physical harm at the time of the assault is a close question in this case. The Plaintiff does not use the “magic words”, but under the Federal pleading rules, he is not required to do so. Plaintiff does state that another inmate assaulted him with a law book. The attack left him with a “split open” left eye and a cut on his forearm. It is not clear whether this should qualify as being in imminent danger of serious physical harm. Defendants, however, have not challenged Plaintiff’s right to proceed with this claim based on § 1915(g). Therefore, the Court will accept as credible Plaintiff’s factual statements, and find them sufficient to support an allegation of “serious physical harm” in order to avoid the “three strike” rule of the PLRA.

B. § 1983 Claim

Having decided that Plaintiff is allowed to proceed, the Court must now determine whether he has stated an actionable § 1983 claim. There are two requirements that must be plead to state a claim under § 1983. The first is that the defendant deprived plaintiff of a right or privilege secured by the Constitution or the laws of the United States. See Riley v. Jeffes, 777 F.2d 143, 145 (3d Cir.1985). The second requirement is for the Defendant to be acting “under color of law” at the time of the deprivation. See Colburn v. Upper Darby Township, 838 F.2d 663, 667 (3d Cir. 1988). Defendants admit that Plaintiff has adequately alleged the second requirement of the § 1983 action. They dispute that Plaintiff has sufficiently alleged a violation of the Eighth Amendment.

As Defendants point out, Defendants can not be held liable for violations of the Eighth Amendment unless officials know of and disregard excessive risk to the health or safety of prisoners. See Farmer v. Brennan, 511 U.S. 828, 114 S.Ct. 1970, 1974 (1994). Proving that any of the Defendant knew of and disregarded an excessive risk of harm to Plaintiff will be extremely difficult for Plaintiff to accomplish. However, the Court can not say that Plaintiff could prove no set of facts in support of his claim that Defendants were deliberately indifferent to a risk of serious harm. The Plaintiff’s factual allegations as stated in the Complaint would not be enough to survive a Motion for Summary Judgment. But at this point in the proceedings it would be premature to dismiss the claims. The Court also finds that the Complaint sufficiently outlines the actions of the Defendants Plaintiff is asserting as the basis for his § 1983 claim.

IV. CONCLUSION

The Plaintiff has weakly, but sufficiently for purposes of this Motion, stated a claim for an Eighth Amendment violation under 42 U.S.C. § 1983. Therefore, the Motion to Dismiss must be denied.

An appropriate order follows.

