

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

HENRY CHASE :  
 :  
 : CIVIL ACTION  
 v. :  
 : NO. 98-4100  
 CYNTHIA WARD and WACKENHUT :  
 CORRECTIONS CORPORATION, :  
 incorrectly named as "Health :  
 Services" :

M E M O R A N D U M

WALDMAN, J.

May 10, 2000

This is a 42 U.S.C. § 1983 action. Plaintiff is an inmate in the Delaware County correctional system. In his initial Complaint, plaintiff alleged that defendants Cynthia Ward and Wackenhut Corrections Corporation, incorrectly identified as "Health Services" ("Wackenhut"), acted with deliberate indifference in failing to provide him with adequate medical treatment for a venereal disease in violation of the Eighth Amendment.

In an Amended Complaint, plaintiff added Warden Irwin Goldberg as a defendant and asserted an additional Eighth Amendment claim based on a subsequent failure to provide adequate care when plaintiff suffered burns, cuts and contusions.<sup>1</sup>

---

<sup>1</sup>Warden Goldberg was not added to the caption as a party defendant. An appearance (Doc. #11) was entered on his behalf by Robert M. Diorio, Esq. and Christopher R. Mattox, Esq. on July 8, 1999.

Plaintiff then filed a Second Amended Complaint with additional details. He alleged that he was diagnosed with "shillings," a painful condition, and that when his medication for the condition ran out, his attempts to receive further medication were ignored. Plaintiff alleged that as a result, he has rashes over eighty percent of his body as well as scars and sores. Plaintiff alleged that defendants were aware he has full blown AIDS and thus that any ailment is dangerous to his health.

Plaintiff then filed a Third Amended Complaint, naming Wackenhut/George W. Hill Facility and Warden Irwin Goldberg as defendants.<sup>2</sup> Plaintiff alleged a myriad of constitutional violations which he has allegedly suffered in retaliation for filing this and other civil lawsuits.<sup>3</sup> These include denial of access to a law library, denial of religious materials, denial of showers and exercise for six days, deprivation of property, denial of telephone privileges and of visitation on three occasions, a delay in receipt of mail during a two and a half week period, verbal threats and being beaten and sprayed with mace by officers.

---

<sup>2</sup>Presumably, Wackenhut/George W. Hill Correctional Facility is the same party as Wackenhut Correctional Corporation. Defendants do not argue that the wrong party was named. Plaintiff does not appear to assert the claims in the Third Amended Complaint against defendant Ward.

<sup>3</sup>Plaintiff has filed sixteen § 1983 suits over the past five years against various law enforcement officials and prison authorities. Eleven have been dismissed as frivolous.

Presently before the court is defendants' revised Motion to Dismiss plaintiff's various Complaints pursuant to Fed. R. Civ. P. 12(b)(6) & (15).<sup>4</sup>

Plaintiff's has alleged that medical treatment for his venereal disease was delayed six weeks, that medical treatment for burns was delayed for two days and that he received no adequate treatment for rashes. Plaintiff has alleged that he persistently filed sick call slips, letters, grievances and other requests for medical treatment, and that Ms. Ward and Warden Goldberg had personal knowledge of his complaints regarding lack of medical care.

Plaintiff has alleged that for two days he received only tylenol for first and second degree burns on his face, neck and back he sustained in prison. He has alleged that Dr. Victoria Gessner, who saw him two days later, advised that his injuries were serious, that he should have been treated immediately and sent to an outside hospital because his burns were too extensive to be treated properly at the jail.

---

<sup>4</sup>Dismissal for failure to state a claim is appropriate only when it clearly appears that plaintiff can prove no set of facts to support the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Plaintiff has alleged that he was not treated for painful and irritating sores over his body for six weeks in 1999 despite sending numerous letters to defendant Ward, the head medical administrator and Warden Goldberg complaining about the lack of medical treatment. Ms. Ward never responded to the requests and Warden Goldberg did not respond for six weeks after which he visited plaintiff and told him he would receive treatment. It is not clear from the face of the complaint that treatment was provided even at that time.

To state an Eighth Amendment claim for denial of medical treatment, a plaintiff must show that he had a serious medical condition and that the defendant responded with "deliberate indifference" to that condition. See Wilson v. Seiter, 501 U.S. 294, 303 (1991); Estelle v. Gamble, 429 U.S. 97, 104 (1976). Deliberate indifference may be shown by the delay of necessary treatment for non-medical reasons. See Rouse v. Plaintiff, 182 F.3d 192, 197 (3d Cir. 1999); Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987), cert. denied, 486 U.S. 1006 (1988).

A medical need is serious if it is "one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." Lanzaro, 834 F.2d at 347 (citations omitted). Plaintiff has sufficiently alleged serious medical

needs. To be deliberately indifferent, a prison official must know of and disregard a serious risk to inmate health or safety. Farmer v. Brennan, 511 U.S. 825, 837 (1994); Durmer v. O'Carroll, 991 F.2d 64, 68 (3d Cir. 1993). Thus, medical malpractice or negligence is not sufficient to sustain a constitutional claim. See Estelle, 429 U.S. at 105; Plasko v. City of Pottsville, 852 F. Supp 1258, 1264 (E.D. Pa. 1994).

There is no respondeat superior liability under § 1983. See Durmer, 991 F.2d at 69 n. 14; Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976). To be liable, a defendant must personally participate or knowingly acquiesce in the unconstitutional conduct. See Capone v. Marinelli, 868 F.2d 102, 106 n.7 (3d Cir. 1989); Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988); Jones v. Culinary Manager II, 30 F. Supp. 2d 491, 496 (E.D. Pa. 1998). Plaintiff has sufficiently alleged that the defendants knew of his medical conditions and knowingly acquiesced in the denial or delay of treatment for them.<sup>5</sup>

---

<sup>5</sup>A warden who is not a medical professional is not deliberately indifferent merely for failing to respond directly to the medical complaints of an inmate who is being treated by professional staff on whose expertise the warden may rely. See Durmer v. O'Carroll, 991 F.2d 64, 68 (3d Cir. 1993). It is not clear from the face of plaintiff's pleadings, however, that he was receiving medical care at the time he complained to Warden Goldberg. Also, it is alleged that the Warden was involved in the process and he promised plaintiff he would ensure the provision of medical treatment. This is sufficient to withstand a motion to dismiss. See Saunders v. Horn, 960 F. Supp. 893, 896 (E.D. Pa. 1997).

Plaintiff's Third Amended Complaint, however, is another matter.

Defendants argue that this Complaint, whether viewed as an amendment or supplement to his prior pleadings, is procedurally defective as plaintiff failed to secure leave of court to file it and failed to file a "certificate of service" with it. Defendants assert that if the Third Amended Complaint is construed as a supplemental pleading, it is barred for failure to comply with Fed. R. Civ. P. 15(d) and if it is construed as an amended pleading, it should be dismissed for failure to comply with Fed. R. Civ. P. 15(a). The Third Amended Complaint is most accurately characterized as a supplemental pleading as it sets forth subsequent events and represents additions to the earlier pleadings. See Owens-Illinois, Inc. v. Lake Shore Land Co., Inc., 610 F.2d 1185, 1188 (3d Cir. 1979); Wright, Miller & Kane, Federal Practice and Procedure: Jurisdiction 2d § 1504. Plaintiff's purpose was not to supplant a prior complaint entirely, but to add additional causes of action.

Rule 15(d) provides that "(u)pon motion of a party the court may, upon reasonable notice and upon terms such as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Plaintiff did not request leave of court to file this supplement

and did not include a certificate of service. As plaintiff is proceeding pro se, however, the court will determine on the merits whether leave to supplement should be granted.<sup>6</sup>

Whether to allow a party to file a supplemental pleading is committed to the discretion of the court and is freely granted when doing so will promote the efficient disposition of the entire controversy between the parties, will not cause undue delay and will not prejudice the rights of any of the parties. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 1504 at 186-187. Leave is properly denied, however, to the extent a proposed pleading sets forth claims which could not withstand a motion to dismiss and would thus be futile.

Defendants do not claim that they would be prejudiced or that any inefficiency or undue delay would result from granting leave. Defendants do argue that plaintiff has set forth no facts from which their personal involvement can be inferred and the Third Amended Complaint thus fails to state a claim upon which relief may be granted.

It is well established that "[a]n action that would

---

<sup>6</sup> Plaintiff has provided the court with a "Notification to Defendants [sic] Attorney's [sic]" in which he states that until the court's April 6, 1999 order, he was not aware that he had to serve copies of the complaints to defense counsel and is now forwarding such copies. It is also apparent that defendants have received a copy of the Third Amended Complaint.

otherwise be permissible is unconstitutional if it is taken in retaliation for the exercise of the right of access to the courts." Bradley v. Pittsburgh Board of Education, 910 F.2d 1172, 1177 (3d Cir. 1990); Anderson v. Horn, 1997 WL 152801, \*3 (E.D. Pa. March 28, 1997); Prisoners' Legal Ass'n v. Roberson, 822 F. Supp. 185, 189 (D.N.J. 1993). Plaintiff has claimed that he has been subject to a number of retaliatory acts because he exercised his right of access to the courts.

Insofar as plaintiff has attempted to plead independent claims under § 1983, he has largely failed to do so. See, e.g., Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973) (threatening words and gestures by correctional officers do not constitute § 1983 violation); Hudson v. Palmer, 468 U.S. 517, 533 (1984)(unauthorized intentional deprivation of property does not constitute due process violation where meaningful post deprivation remedy available); Williams v. Frame, 821 F. Supp. 1093, 1098 (E.D. Pa. 1993) (Pennsylvania provides meaningful remedy for wrongful deprivation of property); Flanagan v. Shively, 783 F. Supp. 922, 934 (M.D. Pa.), aff'd, 980 F.2d 722 (3d Cir. 1992), cert. denied, 114 S. Ct. 95 (1993) (neither convicted prisoners nor their family have constitutional right to visitation); Anderson v. Horn, 1997 WL 152801, at \*9 (E.D. Pa. March 28, 1997) (temporary denial of hygiene items does not violate prisoner's right to be free from cruel and unusual

punishment); Briggs v. Heidlebaugh, 1997 WL 318081, \*3 (E.D. Pa. May 21, 1997) (denial of shower for two weeks not constitutional violation); DiFilippo v. Vaughn, 1996 WL 355336, \*5 (E.D. Pa. June 24, 1996) (Eighth Amendment does not require inmates be given frequent showers); Bensinger v. Boyle, 1995 WL 422795, \*2 (E.D. Pa. July 14, 1995) (deprivation of exercise for five straight days not constitutional violation); Acosta v. McGrady, 1999 WL 158471, \*7 (E.D. Pa. Mar 22, 1999) (prisoner has no constitutional right to use telephone where other means of communication are available).

Plaintiff has facially pled claims for denial of religious materials, for an alleged beating and macing by several corrections officers and for denial of access to legal materials insofar as this has hindered efforts to assist in any pending criminal case or to pursue a non-frivolous legal claim to vindicate basic constitutional or civil rights. See Lewis v. Casey, 518 U.S. 343, 354 (1996). Whether the Third Amended Complaint is construed as asserting a retaliation claim or independent constitutional violations, however, plaintiff has not shown that the defendants participated or knowingly acquiesced in the alleged retaliatory acts. See Rode, 845 F.2d at 1207-08 (defendant must have personal involvement; Hampton, 546 F.2d at 1082 (§ 1983 liability cannot be predicated on respondeat

superior).<sup>7</sup>

Accordingly, the Third Amended Complaint will be dismissed and defendants' motion will otherwise be denied.

---

<sup>7</sup>Plaintiff also is barred from proceeding in forma pauperis on any claim which does not involve an imminent danger of serious physical injury. See 28 U.S.C. § 1915(g); Keener v. Pennsylvania Board of Probation & Parole, 128 F.3d 143, 144-45 (3d Cir. 1997) Rauso v. Sutton, 1999 WL 482632, \*1 (E.D. Pa. June 30, 1999); Bolongogo v. Horn, 1997 WL 599160, \*2 (E.D. Pa. July 23, 1997).

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

HENRY CHASE :  
 :  
 : CIVIL ACTION  
 v. :  
 : NO. 98-4100  
 CYNTHIA WARD and WACKENHUT :  
 CORRECTIONS CORPORATION, :  
 incorrectly named as "Health :  
 Services" :

O R D E R

AND NOW, this                    day of May, 2000, upon  
consideration of defendants' revised Motion to Dismiss (Doc.  
#16), consistent with the accompanying memorandum, **IT IS HEREBY**  
**ORDERED** that said Motion is **GRANTED** in part in that plaintiff's  
Third Amended Complaint, filed without leave on August 10, 1999,  
is **DISMISSED** and said Motion is otherwise **DENIED**; and, **IT IS**  
**FURTHER ORDERED** that plaintiff's Motions to Oppose Defendants'  
Motion (Docs. #17 & 18), which although styled and docketed as  
motions are in fact merely plaintiff's responses in opposition to  
defendants' motion to dismiss, are **DENIED** as moot.

BY THE COURT:

---

JAY C. WALDMAN, J.