

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

MARK MITCHELL : CIVIL ACTION
 :
 v. :
 :
 MARTIN F. HORN, et al. : No. 98-4742
 :

MEMORANDUM

Ludwig, J.

May 5, 2005

This is a prisoner's civil rights action, 42 U.S.C. § 1983. In 1985, plaintiff Mark Mitchell was convicted in state court of criminal homicide and related offenses; he is currently serving a life sentence. His pro se complaint and amended complaint assert that in 1996, while at SCI Graterford, drugs were planted in his living area in retaliation for complaints he lodged against a prison guard, and he was deprived of various Constitutional rights in the course of the ensuing investigative and disciplinary proceedings. In 1998, he filed a complaint against prison personnel,¹ setting forth claims for retaliation, deprivation of due process, conditions of confinement/cruel and unusual punishment, and infliction of emotional distress.² Discovery is complete and defendants' motion

¹ Moving defendants are Martin Horn, Donald Vaughn, Dave DiGugliemo, G. Olinger, Ernie Bello, Mike Cappo, and Mary Canino. The remaining defendants - T.A. Chwasciewski, Mary Ann Williams, and Ronald Wilson - are deceased. On April 23, 2004, plaintiff was granted leave to substitute the personal representatives of the decedents' estates. Plaintiff did not do so as to Chwasciewski or Wilson, see Mark Mitchell Notes of Testimony, dated August 18, 2004, at 38-39. Plaintiff agreed to dismiss as to Williams, see N.T. at 37, 164. These two sets of claims will be dismissed.

² This court sua sponte previously dismissed plaintiff's claims as frivolous, Order, September 29, 1998. On appeal, the Court of Appeals reversed, finding

If Mitchell were not provided grievance forms (a fact that needs to be determined by the District Court on remand), he has exhausted the available administrative remedies on his conditions-of-confinement claim as required by § 1997e(a). In any event, he has stated a nonfrivolous retaliation claim. On remand, the District Court should also determine whether Mitchell has been subjected to 'atypical and significant hardship' implicating a protected liberty interest that triggers due

will be granted for the following reasons, Fed. R. Civ. P. 56.³

A. Retaliation

Plaintiff's retaliation claim is asserted only against defendant Wilson, the deceased correctional officer, who is alleged to have planted drugs in plaintiff's space in retaliation for plaintiff's complaints about him. Amended Complaint, ¶ 62. However, neither Wilson nor his personal representative was served with the complaint or the amended complaint. Consequently, the claim will be dismissed with prejudice, Fed. R. Civ. P. 4(m).

B. Infliction of emotional distress

Following issuance of the appellate reversal, plaintiff filed an amended complaint so as to allege a physical injury within the requirements of 42 U.S.C. § 1997e(e).⁴ Such injury may be "less-than-significant-but-[must be]-more-than-*de-minimis*." Mitchell, 318 F.3d at 536. According to the amended complaint, plaintiff, as a result of being placed in a cell unfit for human habitation, had "severe stomach aches, severe headaches, severe dehydration, loss of weight, severe itching, due to

process rights at his disciplinary hearing, and, if so, whether those rights were violated. Finally, he is given the opportunity to amend his complaint to allege physical injury within the meaning of § 1997e(e). If the amended complaint alleges physical injury, the District Court must determine whether it is more than *de minimis* as a prerequisite to asserting emotional injury.

Mitchell v. Horn, 318 F.3d 523, 536 (3d Cir. 2003).

³ "A grant of summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.'" Bensel v. Allied Pilots Ass'n, 2004 WL 2382076, at *3 (3d Cir., Oct. 26, 2004).

⁴ 42 U.S.C. § 1997e(e): "[n]o Federal civil action may be brought by a prisoner confined in jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

the inability to take his prescribed medication, nausea, physical weakness and blurred vision.” Amended Complaint, ¶ 65. In his deposition, plaintiff testified that he experienced these problems during the four days in which he was in the unfit cell, that during this time, a nurse came by and left his medication (which he could not take because he could not drink the water), and that the problems subsided after the cell was cleaned. N.T. at 156-59.

Defendants are correct that transitory “injuries” such as those described by plaintiff are not what was contemplated or authorized in the PLRA. See Siglar v. Hightower, 112 F.3d 191, 192 (5th Cir. 1997) (bruise on ear lasting three days for which no medical treatment was sought and no long term effects felt insufficient to state claim under 1997e(e)). Here, with no more than a temporary, *de minimis* injury, plaintiff cannot prevail on his emotional injury allegation, and judgment must be granted for defendants on this claim.

C. Due Process

There appear to be two due process claims - one associated with plaintiff’s disciplinary incarceration following the drug charges, and one in regard to the hearing on those charges.

1. Disciplinary incarceration

Analyzing a procedural due process claim requires determining in the first instance whether the interest to be protected is one “within the liberty or property language of the 14th amendment,” and then, what process is due. Shoats v. Horn, 213 F.3d 140, 143 (3d Cir. 2000). No liberty interest is at stake in being kept in the general prison population or in a mere transfer to some form of disciplinary housing. But a liberty interest inheres in avoiding “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995). See also Mitchell, 318 F.3d at 531.

Here, plaintiff was confined in the Residential Housing Unit at Graterford (including both

pre-hearing confinement and disciplinary custody) for two months, concededly not an atypical period of confinement. See N.T. p. 141. Further, the “unfit” conditions in one of the four cells inhabited by plaintiff persisted for no more than two days - which does not amount to a due process violation. See Beverati v. Smith, 120 F.3d 500 (4th Cir. 1997) (six months’ exposure to vermin, smears of feces and urine, flooding and unbearable heat were “not so atypical that exposure to them . . . imposed a significant hardship in relation to the ordinary incidents of prison life.”); Higgason v. Swihart, 1996 WL 441774, at *8 (N.D. Ind., May 17, 1996) (two years’ exposure to cockroaches and mice and human waste not atypical).⁵

Discovery having revealed no other facts to suggest that the conditions of plaintiff’s disciplinary confinement differed markedly from allegedly comparable conditions of confinement, the interest advanced by plaintiff is not one “within the liberty or property language of the 14th amendment” and, consequently, cannot support a procedural due process claim. Defendants, as a matter of law, are entitled to judgment on this claim.

2. Misconduct proceedings

Here, plaintiff’s position is that he was given inadequate time to meet with his inmate assistant, that his claim that he was framed was not properly investigated, and that he was otherwise denied an opportunity to present a meaningful defense.

A prison inmate’s due process rights in regard to an administrative hearing include (1) the right to appear before an impartial decision-maker; (2) the right to receive advance written notice of the charges against his; (3) the right to call witnesses and present other evidence so long as doing so is not at odds with prison safety; (4) the right to be assisted by an inmate representative; and (5)

⁵ These citations are given as examples of current law - and are not endorsed here as to what the law in this area should be.

the right to a written statement by the decision-maker summarizing the evidence and the reason for any disciplinary action. See Wolff v. McDonnell, 418 U.S. 539, 564-69 (1974); Griffin v. Spratt, 969 F.2d 16, 19 (3d Cir. 1992); Garfield v. Davis, 566 F. Supp. 1069, 1072-73 (E.D. Pa. 1983).

Plaintiff concedes having received notice of the charges against him and a written decision, together with permission to call witnesses at the hearing. The amended complaint alleges as follows: defendant Canino was not an impartial decision-maker and interfered with his right to meet with his inmate representative, Amended Complaint, ¶ 63; that defendants Bello, Cappo and Vaughn, who reviewed Canino's decision, merely "rubber-stamped" it, id. at ¶ 64; that defendants DiGugliemo and Olinger, members of the "Program Review Committee," wrongly continued plaintiff's disciplinary custody, id. at ¶ 67; and that defendant Horn, former Pennsylvania Secretary of Corrections, did nothing for him. Id. at ¶ 68. These claims were denied by defendants, and, more significantly, none was supported by evidence.

D. Conditions of Confinement

Plaintiff's conditions of confinement claim is asserted against John Doe defendants only. Amended Complaint, ¶ 66. Even if asserted against a specifically named defendant, no Eighth Amendment violation has been evinced. An Eighth Amendment violation requires an objectively serious deprivation and deliberately indifferent conduct. See Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson v. Seiter, 501 U.S. 294, 303 (1991). Here, plaintiff's four-day confinement in a cell alleged to have been smeared with human waste and infested with flies, where kicking and banging of other inmates occurred at all hours - albeit extremely deplorable, has been held not to amount to such a deprivation. See Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988) (10 days in "filth, roach-infested" cell, without toilet paper, toothbrush or toothpaste was not cruel and unusual punishment); Stone-El v. Sheehan, 914 F. Supp 202, 206 (N.D. Ill. 1995) (noisiness and lack of any

mattress, forcing inmate to sleep on bare floor in presence of vermin, did not implicate constitutional rights).

Moreover, on this record, it cannot be said that defendants were deliberately indifferent to plaintiff's circumstances. Plaintiff admits that upon his report, the "Program Review Committee" inspected and cleaned the cell and secured better accommodations for him and his fellow inmate. N.T. at 22-23.

Given these facts, defendants, as a matter of law, are also entitled to judgment on the conditions of confinement claim.

E. Malicious Prosecution

The dismissal of the criminal drug charge against plaintiff is the basis for the malicious prosecution claim. On this count, he has not responded to defendants' summary judgment motion, which, under Local Rule 7.1(c), could be granted as uncontested. In addition, however, this claim appears to be meritless.

Under Albright v. Oliver, 510 U.S. 266, 271 (1994), the tort of malicious prosecution may be actionable if "consistent with the concept of seizure." Donahue v. Gavin, 280 F.3d 371, 379, 382 (3d Cir. 2002). As a lifer, plaintiff may be hard-pressed to overcome defendants' argument that he had no liberty interest on which the criminal prosecution could have conceivably impinged. However, his incarceration status is not necessarily a firm footing for that conclusion. The more telling point is that there is no evidence of responsibility for the prosecution, malicious or not, attributable to any of the defendants.

BY THE COURT:

Edmund V. Ludwig, J.

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ORDER

AND NOW, this 5th day of May, defendant's motion for summary judgment is granted. A memorandum accompanies this order.

BY THE COURT:

Edmund V. Ludwig, J.