

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

| | | |
|-----------------------------------|---|---------------------|
| COREY HINTON, | : | CIVIL ACTION |
| Plaintiff | : | |
| | : | |
| v. | : | No. 08-0295 |
| | : | |
| FRANKLIN J. TENNIS, et al. | : | |
| Defendants | : | |

MEMORANDUM

STENGEL, J.

March 12, 2009

Corey Hinton, a current inmate at the State Correctional Institution at Rockview, brought this *pro se* civil rights action pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the Fifth and Sixth Amendments to the Constitution. Mr. Hinton names twelve (12) defendants consisting of various officials of the correctional facilities in which he has been incarcerated.¹ The defendants have filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, I will grant the motion in part and deny it in part.

¹ Three of the named defendants are listed as holding various positions at Coleman Hall, a residential community corrections program in Philadelphia. Mr. Evans Gary, Jr., is listed as the Superintendent; Mr. Richard Bennett as a Supervisor; and Mr. Hamilton as an Operations Counselor. Of these three defendants, only Mr. Hamilton was properly served with the complaint. Because Mr. Hinton is proceeding *pro se*, my staff contacted Coleman Hall by telephone and was informed that Mr. Gary and Mr. Bennett do not work at Coleman Hall. Mr. Hamilton has not responded to the complaint. Further, no attorney has entered an appearance on Mr. Hamilton's behalf.

I. BACKGROUND

Mr. Hinton alleges that on January 4, 2007, he was issued a misconduct report claiming that he had been involved in an early morning altercation a few days earlier with a staff member of Coleman Hall. He was then transferred from Coleman Hall to the State Correctional Institution at Graterford. Prior to the disciplinary hearing, Mr. Hinton filed an Inmate Statement denying the allegations along with a Witness Statement requesting witnesses for the hearing. At the time set for the hearing, Mr. Hinton was informed by Mary Cavino, a hearing examiner, that the disciplinary misconduct report had been dismissed without prejudice.

On February 7, 2007, Mr. Hinton was issued a second misconduct report based on the same altercation as the initial charge. On the following day, Mr. Hinton was again advised that the misconduct report was dismissed.

In late March, after being transferred to the State Correctional Institution at Rockview, Mr. Hinton received his third misconduct report, based on his involvement in the same January 1, 2007 altercation. In preparation for the hearing, Mr. Hinton submitted an Inmate Response form denying the allegations, along with a Witness Statement. At the hearing, Robert Reed, a hearing examiner, denied Mr. Hinton's request for witnesses and found Mr. Hinton guilty of the misconduct charges. Mr. Hinton does not indicate what sanction or penalty he received for the misconduct. He does claim, however, that the failure to allow him to call witnesses in his defense violated due

process. Mr. Hinton alleges that he appealed the decision to the highest level of review.

According to his complaint, Mr. Hinton seeks the reversal of the hearing examiner's decision, expungement of the incident from his record, re-instatement of his pre-release status, and punitive damages in the amount of \$10,000 plus costs and attorneys fees.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted examines the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The factual allegations must be sufficient to make the claim for relief more than just speculative. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In determining whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id.; see also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Id. The "complaint must allege facts suggestive of [the proscribed] conduct." Twombly, 550 U.S. at 555. Neither

“bald assertions” nor “vague and conclusory allegations” are accepted as true. See Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pennsylvania Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). The claim must contain enough factual matters to suggest the required elements of the claim or to “raise a reasonable expectation that discovery will reveal evidence of” those elements. Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (quoting Twombly, 550 U.S. at 555). It is important to note that “a *pro se* complaint . . . can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” See Estelle v. Gamble, 429 U.S. 97, 104 (1976).

III. DISCUSSION

Mr. Hinton alleges that he was denied both his right to Due Process and his liberty interest when he was not permitted to call witnesses at his misconduct hearing. He indicates that the liberty interest was granted to him by the Pennsylvania Board of Probation and Parole, as is evidenced by his placement in Coleman Hall. Mr. Hinton insists that by transferring him from Coleman Hall to Graterford without a hearing and without the ability to call witnesses, the Department of Corrections terminated that liberty interest, and violated his Fifth and Sixth Amendment rights.

Title 42 of the United States Code § 1983 provides remedies for deprivations of rights established in the Constitution or federal laws. It does not, by its own terms, create

substantive rights. Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979). Section 1983 provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To succeed on a due process claim, Mr. Hinton must first demonstrate that he was deprived of a liberty interest. Fraise v. Terhune, 283 F.3d 506, 522 (3d Cir. 2002).

Liberty interests may arise from the Due Process Clause or from a state-created liberty interest. Id. The liberty interest of prisoners protected by the Due Process Clause is “generally limited to freedom from restraint which . . . imposes 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). The standard of determination for what is “atypical and significant” is based upon the “ordinary incidents of prison life an inmate would reasonably expect to encounter.” Asquith v. Dep’t of Corrections, 186 F.3d 407, 412 (3d Cir. 1999).

Under certain circumstances, states may create liberty interests that are protected by the Due Process Clause. Sandin v. Conner, 515 U.S. at 484. “But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its

own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Id.

Here, Mr. Hinton’s transfer from Coleman Hall to Graterford occurred before the alleged denial of his constitutional rights. He does not indicate what type of penalty or consequence he received as a result of being found guilty of the misconduct charges. There is no allegation that, as a result of being found guilty, Mr. Hinton was restrained in a manner which imposed “atypical and significant hardship.” Accordingly, it is impossible to determine whether the penalty imposed upon Mr. Hinton is the sort of confinement or conditions that a prisoner would reasonably anticipate receiving at some point in his incarceration. See Torres v. Fauver, 292 F.3d 141, 150 (3d Cir. 2002). Without an allegation that he was subject to an atypical and significant hardship, he fails to state a claim under the Due Process Clause as the complaint currently stands.

Courts are to construe complaints so as to do substantial justice keeping in mind that *pro se* complaints in particular should be construed liberally. Alston v. Parker, 363 F.3d 229, 234 (3d Cir. 2004). Under our notice pleading standards, although a complaint does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). This does not impose a probability requirement at the pleading stage, but instead “simply calls for enough facts to raise a reasonable

expectation that discovery will reveal evidence of” the necessary element. Id. at 556; see also Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008).

Accordingly, I will order that Mr. Hinton amend his complaint to conform with the requirements articulated above within thirty (30) days of the date of this Memorandum and Order. Failure to comply may result in the dismissal of this case. See FED.R.CIV.P. 12(e). Specifically, in setting forth a Due Process claim, the plaintiff should state whatever consequence was imposed upon him as a result of his being found guilty of misconduct.

Finally, Mr. Hinton claims to have been harassed by Officer Simcox who “constantly remind[ed] petitioner of his return to the facility through his own stupidity, making threats towards petitioner of writing him up every chance he gets and in fact issuing petitioner a misconduct report.” Mr. Hinton makes no allegations of any physical injury as a result of this harassment. Under the Prison Litigation Reform Act, claims for mental and emotional damages by inmates are barred unless there is a prior showing of a physical injury. 42 U.S.C. § 1997e(e). Furthermore, it is well established that verbal harassment or threats of the sort alleged here will not, without some reinforcing act accompanying them, state a constitutional claim. See 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); Collins v. Cundy, 603 F.2d 825, 826 (10th Cir. 1979) (allegations that the sheriff laughed at prisoner and threatened to hang him did not state claim for constitutional violation); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (allegations of vulgarity did not state constitutional claim). 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). A constitutional claim based only on verbal threats will fail, moreover, whether it is asserted under the Eighth Amendment's ban on cruel and unusual punishment or under the Fifth Amendment's substantive due process clause. See Prisoners' Legal Ass'n, 822 F. Supp. at 189 (cruel and unusual punishment theory); Pittsley v. Warish, 927 F.2d 3, 7 (1st Cir. 1991) (substantive due process theory).

I accept Mr. Hinton's allegations as true, as I must. However, he does not contend that the verbal harassment was accompanied by any type of reinforcing act. With no such showing, Mr. Hinton's emotional injury claims are barred. Thus, because Defendant Simcox's alleged conduct is not actionable under the Constitution, I will dismiss him as a defendant in this action.

An appropriate Order will follow.

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ORDER

AND NOW, this 12th day of March, 2009, upon consideration of the Commonwealth Defendants' motion to dismiss (Document #10), and the plaintiff's response thereto (Document #18), it is hereby **ORDERED** that the motion is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that:

1. Defendant Simcox is **DISMISSED** as a defendant in this action;
2. Defendants Evans Gary, Jr., and Richard Bennett are **DISMISSED** as defendants in this action because of the lack of proper service;
2. The plaintiff shall file an amended complaint consistent with this Memorandum within thirty (30) days of the date of this Order;
3. Also within thirty (30) days of the date of this Order, Defendant Mr. Hamilton shall file a reason to show cause why default judgment should not be entered against him for failure to respond to this complaint.

BY THE COURT:

/s/Lawrence F. Stengel
LAWRENCE F. STENGEL, J.