

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

CARL M. SMITH, : **CIVIL ACTION**
 : **NO.97-3037**
Plaintiff, :
 :
v. :
 :
LEO LUCIANI et al. :
 :
Defendants. :

CARL M. SMITH, : **CIVIL ACTION**
 : **NO.97-3613**
Plaintiff, :
 :
v. :
 :
ROBIN MENSINGER et al., :
 :
Defendants. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

March 31, 1998

Plaintiff Carl M. Smith, an inmate at the State Correctional Institution at Pittsburgh, Pennsylvania ("SCI Pittsburgh"), has filed two lawsuits against various corrections officers, a prison hearing examiner, a prison business manager, the Pennsylvania State Police, a state police trooper, and attorneys from the district attorney's offices alleging a myriad of constitutional claims arising from a series of physical confrontations between the corrections officers and plaintiff which allegedly took place on June 3, 1995 at the State Correctional Institution at Frackville, Pennsylvania ("SCI

Frackville") and from their aftermath.¹

In the first lawsuit, Smith v. Mensinger, No. 97-3613, plaintiff claims that several corrections officers violated his constitutional rights when he was beaten during the course of the June 3, 1995 incidents. In this action, plaintiff also alleges that prison Hearing Examiner Mary Canino violated his constitutional rights while she presided at an administrative hearing held on June 8, 1995 at the State Correctional Institution at Mahanoy, Pennsylvania ("SCI Mahanoy") to adjudicate the citations which were issued to plaintiff by Corrections Officer Mensinger and Department of Corrections Sergeant Jerome E. Paulukonis as a result of the June 3, 1995 incidents. Further, plaintiff claims that L. Paul Burgard, business manager at SCI Pittsburgh, failed to adequately investigate a deduction of \$165.00 from plaintiff's inmate account ordered by Hearing Examiner Canino. Finally, plaintiff seeks to join Martin Dragovich, the superintendent of SCI Mahanoy, who is alleged to have violated plaintiff's constitutional rights by failing to adequately investigate the facts alleged in plaintiff's appeal from sanctions imposed by Hearing Examiner Canino at the administrative hearing.

¹ Plaintiff has filed a third lawsuit, Smith v. Urban, No. 97-6027, 1998 WL 98985 (E.D.Pa. Mar 06, 1998), claiming that his constitutional rights were violated by the public defender who assisted him in defending against a criminal prosecution which the Commonwealth of Pennsylvania brought against plaintiff as a result of the June 3, 1995 incidents. The Court previously dismissed this claim.

In the second suit, Smith v. Luciani, No. 95-3037, plaintiff claims that Pennsylvania State Police Trooper Leo Luciani and the Pennsylvania State Police violated his constitutional rights while conducting an investigation into an accusation that plaintiff assaulted Corrections Officer Robin Mensinger during the June 3, 1995 incident. In this case, plaintiff also seeks to join the Trooper Luciani's supervisor, John Doe, for failure to investigate the alleged defects in the investigation. Plaintiff also claims that his constitutional rights were violated by the prosecutors from the district attorney's office who filed criminal charges against him based on the alleged assault on Corrections Officer Mensinger.

Before the Court are defendants' motions to dismiss. Upon review of the pleadings and for the reasons set forth below, the Court finds:

1. In the case of Smith v. Luciani, No. 97-3017, all claims against Trooper Luciani, the Pennsylvania State Police, and Supervisor John Doe will be dismissed; the actions against prosecutors Foust and Noon were previously dismissed by the Court; and

2. In the case of Smith v. Mensinger, No. 97-3613, all claims against Corrections Officer Mensinger and Sergeant Paulukonis, Hearing Examiner Canino, Business Manager Burgard, and Superintendent Dragovich will be dismissed; and all claims for use of excessive force against Corrections Officers Novitsky, Androshick, McCole, Jones, Zubris, and Sergeant Yurkiewicz, will

be allowed to proceed.

As a result of these rulings, the only claims left of the myriad of allegations made by plaintiff are those against Corrections Officers Novitsky, Androshick, McCole, Jones, Zubris, and Sergeant Yurkiewicz, in Smith v. Mensinger, for use of excessive force.

I. FACTS

On June 3, 1995, plaintiff, who at the time was an inmate at the State Correctional Institution at Frackville, Pennsylvania ("SCI Frackville"), was issued three misconduct reports. The first misconduct report, issued by Corrections Officer Mensinger, whom plaintiff avers was "[at the time the misconduct reports were issued] very much drunk and out of control," alleged that plaintiff refused to obey an order by not returning to his cell after the cell was cleaned and by using abusive language; the second report, also issued by Corrections Officer Mensinger, alleged that plaintiff punched Corrections Officer Mensinger twice in the eye; and the third misconduct report, issued by Sergeant Paulukonis, alleged plaintiff had assaulted the corrections officers who were escorting plaintiff to the Restricted Housing Unit ("RHU"), following the incident with Corrections Officer Mensinger.

Plaintiff claims that after the alleged assault on Corrections Officer Mensinger, he was handcuffed and taken to the unit manager's office on the cell block by Corrections Officers

Novitsky, Androshick, McCole, Zubris, and Sergeant Yurkiewicz. There, Corrections Officer Jones joined the other corrections officers. Plaintiff claims that while at the unit manager's office Corrections Officer Novitsky choked and punched him, while Sergeant Yurkiewicz kicked him. Plaintiff admits that he "could not exactly see what Corrections Officers Androshick, McCole, Zubris, or Jones," were doing at that time, "[b]ut [he] could feel a great force behind [him], as [he] was being pushed around in the unit managers office." Plaintiff claims that other unnamed corrections officers then took him to a security area, where Sergeant Yurkiewicz got on top of him, tightened his handcuffs causing his wrists to become discolored, subjected him to racial epithets, and hit him on the back of the head. Finally, plaintiff contends that Sergeant Paulukonis fabricated the third misconduct report to "justify the beating" plaintiff alleges he received at the hands of the Corrections Officers.

Plaintiff alleges that on June 4, 1995, defendant Pennsylvania State Police Trooper Leo Luciani interviewed him about the claim by Corrections Officer Mensinger that plaintiff had assaulted her. Plaintiff claims that Trooper Luciani fabricated the state police incident report, tampered with the "victim of the assault," obstructed justice by failing to identify in the investigation report the exculpatory photographs of Corrections Officer Mensinger plaintiff had observed, and that the Pennsylvania State Police is responsible for Trooper Luciani's actions and should have been aware of Trooper Luciani's

intentions to bring false charges against plaintiff and to fabricate evidence. Plaintiff also claims that he was arrested without probable cause and that the criminal complaint and arrest warrant were fabricated documents.

Plaintiff alleges that on June 5, 1998, a misconduct hearing was scheduled to be held at SCI Frackville before Hearing Examiner Mary Canino. Plaintiff claims that Hearing Examiner Canino told him at the hearing that his witnesses were not available. The hearing was continued until June 8, 1995, at SCI Mahanoy, where plaintiff had been transferred.

Plaintiff claims that on June 8, 1995, Hearing Examiner Canino told him that although his witnesses could not be present at the administrative hearing because they were not housed at SCI Mahanoy, he could obtain their written statements for use at the hearing by signing some "papers." Plaintiff avers that he refused to sign the documents because he did not trust prison officials, and that Hearing Examiner Canino then refused to continue the hearing a second time. At the June 8 hearing, plaintiff claims he told Hearing Canino about his interview with Trooper Luciani and that Trooper Luciani possessed allegedly exculpatory photographs of Corrections Officer Mensinger. Plaintiff claims that Hearing Examiner Canino again refused to grant a continuance so that he could obtain the allegedly exculpatory photographs. Plaintiff complains that the hearing was constitutionally defective because Hearing Examiner Canino refused to consider the allegedly exculpatory photograph or

photographs of Corrections Officer Mensinger,² "because no evidence was presented to support Corrections Officer Mensinger's allegations, and because plaintiff was not allowed to call witnesses in his defense. Plaintiff was found guilty and sentenced to seven months disciplinary time. Hearing Examiner Canino also assessed plaintiff's inmate account \$165.00 to cover the cost of Corrections Officer Mensinger's replacement contact lenses. Plaintiff refused to sign the cash slip authorizing the deduction.

Plaintiff further alleges that some time in September, 1995, after the \$165.00 was deducted from his inmate account, despite his refusal to sign the cash slip authorizing the deduction, he filed an inmate grievance pursuant to prison regulations to protest the assessment. Plaintiff complains that L. Paul Burgard, business manager at SCI Pittsburgh, where plaintiff was transferred sometime after the June 8, 1995 hearing, failed to adequately investigate plaintiff's complaint,

² According to plaintiff defendant Mensinger admitted to taking photographs of her injuries, but that these allegedly exculpatory photographs were not disclosed to him by the prosecutors during the criminal proceedings. On July 21, 1997, in Smith v. Luciani, No. 97-3037, the Court dismissed plaintiff's claims against defendant prosecutors Faust and Noon with prejudice on the grounds that they were entitled to absolute immunity. See Imbler v. Pachtman, 424 U.S. 409 (1976). On March 5, 1998, in a separate case growing out of plaintiff's criminal prosecution for the assault on Officer Mensinger, Smith v. Urban, No. 97-6027, the Court dismissed plaintiff's claims against his public defender. See Heck v. Humphrey, 512 U.S. 477, 483 (1994); Borsello v. Leach, 737 F.Supp. 25, 26 (E.D.Pa. 1990); Rooks v. Driadon, No. 95-4326, 1993 WL 166757 (E.D.Pa. May 18, 1993)(citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)).

and thus, according to plaintiff, Mr. Burgard's inaction deprived him of his constitutional right to due process.

Plaintiff avers that he has exhausted the relevant prison administrative procedures to appeal Hearing Examiner Canino's ruling and to appeal the deduction of the \$165.00 from his inmate account.

In October 1995, the district attorney for Schuylkill County, Pennsylvania brought charges against plaintiff for the alleged assault on Corrections Officer Mensinger. Plaintiff pleaded guilty to those charges, and is now attempting to withdraw his guilty plea. It appears from the record that plaintiff's effort to withdraw his guilty plea on the assault charge is now before the Pennsylvania Superior Court.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim serves to test the sufficiency of a complaint. See Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A plaintiff's allegations are considered true and are construed in the light most favorable to him. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249, 109 S.Ct. 2893, 2906 (1989); Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Moreover, the complaint should not be dismissed "unless it appears beyond doubt that [the plaintiff] can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957); Frazier v. Southeastern Pa. Transp. Auth., 785 F.2d 65, 66 (3d Cir. 1986).

In the case of a pro se plaintiff, the Court has a "special obligation to construe [plaintiff's] complaint liberally."

Zilich v. Lucht, 981 F.2d 694 (3d Cir. 1992) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)).

III. DISCUSSION

A. Collateral Attack of Plaintiff's Assault Conviction

Plaintiff complains that Trooper Luciani³ fabricated evidence and that Corrections Officer Mensinger fabricated the misconduct charge and failed to produce photographs of her eye injuries at his criminal proceedings, thus depriving plaintiff of his rights under the Fourth and Fourteenth Amendments. Plaintiff seeks relief in the form of damages and injunctive relief, including the reversal of Plaintiff's state conviction. Because plaintiff is essentially attempting to collaterally attack his criminal conviction through these allegations, his claim is not cognizable under 42 U.S.C. § 1983. See Heck v. Humphrey, 512 U.S. 477, 483 (1994). A § 1983 claim which implicates the validity of a prior criminal conviction cannot proceed unless the plaintiff proves that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a writ of habeas corpus." Id. at 486-87. Plaintiff has made no such claim here. Therefore, plaintiff's claims against Trooper Luciani and Corrections Officer Mensinger are

³ Plaintiff also imputes liability to the defendants Pennsylvania State Police and John Doe for Luciani's actions.

dismissed.

B. Eleventh Amendment Immunity of State Agencies and Their Employees

Furthermore, all claims against the Pennsylvania State Police, Trooper Luciani, Corrections Officer Mensinger, Sergeant Paulukonis, Hearing Examiner Canino, and Business Manager Burgard in their official capacities must be dismissed because these claims are barred by the Eleventh Amendment, and because these defendants are not persons within the meaning of 42 U.S.C. § 1983. The Eleventh Amendment to the United State Constitution bars suit in federal court to recover damages against the Commonwealth of Pennsylvania and its agencies as arms of the state. U.S. Const. amend XI; Welch v. Texas Dep't of Highways and Public Transp., 483 U.S. 463, 472-474 (1987). Moreover, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). The Commonwealth of Pennsylvania has not waived its immunity under the Eleventh Amendment, see 42 Pa. Cons. Stat. § 8521(b), and 42 U.S.C. § 1983 does not abrogate the Eleventh Amendment immunity. Quern v. Jordan, 440 U.S. 332, 340-345 (1979).

C. Due Process

1. Misconduct report and hearing

Plaintiff claims he was falsely accused by Corrections Officer Mensinger and Sergeant Paulukonis, in violation of his due process rights, when defendants filed misconduct reports.

Plaintiff further avers that Hearing Examiner Canino violated his due process rights at the June 8, 1995 hearing when she refused to permit plaintiff to call witnesses because they were not housed at SCI Mahanoy where the hearing was held, because she refused to consider the allegedly exculpatory photographs of Corrections Officer Mensinger, and because no evidence was presented to support Corrections Officer Mensinger's allegation.

Plaintiff's claims, however, are not cognizable under the Constitution. First, a claim by a prisoner that he or she was falsely accused of misconduct under prison regulations, without more, does not state a claim of a Constitutional violation. Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986). Second, plaintiff had no constitutional right to an administrative hearing before a sentence of seven months disciplinary time is imposed. According to the Third Circuit in Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997):

Due process protection for a state created liberty interest is . . . limited to those situations where deprivation of that interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Moreover, the baseline for determining what is "atypical and significant"--the "ordinary incidents of prison life"--is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law.

Griffin, 112 F.3d at 706 (3d Cir. 1997) (citing Sandin v. O'Connor, 515 U.S. 472 (1995)). In Griffin, the court found that a period of administrative custody as long as 15 months, did not deprive the prisoner plaintiff of a liberty interest, and thus he

was not entitled to procedural due process protection.⁴ Griffin, 112 F.3d at 708. In this case, plaintiff was subjected to seven months disciplinary time, a period of time half of that implicated in Griffin. Therefore, punishment of seven months in administrative custody, does not present "the type of atypical, significant deprivation [in the context of prison life] in which a state might conceivably create a liberty interest." Sandin, 515 U.S. at 486 (1995). See, e.g., Sack v. Canino, No. 95-1412, 1995 WL 498709 (E.D.Pa. Aug 21, 1995).

2. Involuntary deduction from plaintiff's inmate account

Plaintiff also claims that Hearing Examiner Canino and Business Manager Burgard violated his due process rights when, following the misconduct hearing, \$165.00 was improperly withdrawn from his inmate account to pay for Corrections Officer Mensinger's replacement contact lenses. Plaintiff contends that despite his refusal to consent, Hearing Examiner Canino ordered the amount deducted from his inmate account. The Supreme Court has held that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Since

⁴ In Griffin, the prisoner had been held in administrative custody for period of 15 months after he was suspected of having committed rape of female prison guard. Griffin, 112 F.3d 703.

Plaintiff appears to have a state remedy for his property claim, see 42 Pa. Cons. Stat. § 8522,⁵ a § 1983 action on this basis is inappropriate.

D. Claims Against Supervisors

The Court will grant plaintiff's motion for leave to amend his complaints to add Superintendent Martin Dragovich and Supervisor John Doe, whom plaintiff avers are respectively the superintendent of SCI Mahanoy and Trooper Luciani's supervisor. However, the Court will dismiss these defendants pursuant to 28 U.S.C. § 1915A.⁶ This statute was enacted by Congress on April

⁵ The statute provides in pertinent part:

(b) Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(3) Care, custody or control of personal property.--The care, custody or control of personal property in the possession or control of Commonwealth parties, including Commonwealth-owned personal property and property of persons held by a Commonwealth agency, except that the sovereign immunity of the Commonwealth is retained as a bar to actions on claims arising out of Commonwealth agency activities involving the use of nuclear and other radioactive equipment, devices and materials.

42 Pa. Cons. Stat. § 8522.

⁶ 28 U.S.C. § 1915A provides:

(a) Screening.-- The Court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

26, 1997, directs federal courts to screen out meritless cases by reviewing, before docketing or as soon after docketing as practicable, civil complaints in which prisoners seek redress from a government entity or officer or employee of a government entity. 28 U.S.C. § 1915A(a). Under this screening process, the court is required to dismiss, at the earliest appropriate time, any claim which is frivolous or malicious, or which fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915A(b). A legally frivolous claim is one that based on an indisputably meritless legal theory. Neitzke v. Williams, 490 U.S. 319, 327(1989); Deutsch v. United States, 67 F.3d 1080, 1085 (3d Cir. 1995).

Plaintiff claims that Superintendent Dragovich, "became responsible for them when he failed to correct them in the course of his supervisory responsibilities." Plaintiff further argues that high level supervisors such as Superintendent Dragovich have a duty to conduct a "minimal investigation when confronted with

(b) Grounds for dismissal.-- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition. -- As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or divisionary program.

evidence of due process violations], and they may be held liable for their failure to perform this duty." Plaintiff claims that Supervisor Doe allowed Trooper Luciani to "conceal exculpatory evidence and fabricate arrest documents, when there was no probable cause to arrest the plaintiff" and to tamper with the alleged victim when exculpatory evidence existed.

"It is well settled that the doctrine of respondeat superior may not be employed to impose § 1983 liability on a supervisor for the conduct of a subordinate which violates a citizen's constitutional rights." Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, *263 (3d Cir. 1995) (citing Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978)); Nieves v. Dragovich, No. 96-6525, 1997 WL 698490, *6 (E.D.Pa., Nov 03, 1997). To state a successful claim against Superintendent Dragovich and Supervisor Doe:

[T]he plaintiff is required to show some affirmative conduct by [defendants] which played a role in the violation. Such personal conduct may be shown by demonstrating that [defendants] "participated in violating [plaintiff's] rights, or that he directed others to violate them, or that he, as the person in charge ... had knowledge of and acquiesced in his subordinates' violations."

Moon v. Dragovich, No. 96-5525, 1997 WL 180333, at *2 (E.D.Pa. Apr.16, 1997) (citations omitted) (quoted by Nieves, 1997 WL 698490, *6). Plaintiff admits that Superintendent Dragovich and Supervisor Doe did not themselves commit due process violations. Plaintiff, furthermore, has not alleged the requisite affirmative conduct by Superintendent Dragovich and

Supervisor Doe which played a role in the constitutional violation of which plaintiff complains.

Plaintiff also claims that Superintendent Dragovich violated plaintiff's constitutional rights when he improperly upheld the decision of the hearing examiner and program preview committee who found plaintiff guilty of administrative violations. Prisoners, however, have no constitutional right to a hearing before a term of seven months administrative custody is imposed, because it is not atypical of the types of deprivations expected while in prison. Griffin, 112 F.3d at 706. Because plaintiff's legal theories are indisputably meritless, his claims against Dragovich and Doe must be dismissed as frivolous.

E. Eighth Amendment Claims

Plaintiff's Eighth Amendment claims against Corrections Officers Novitsky, Androshick, McCole, Zubris, Jones, and Sergeant Yurkiewicz for violation of his constitutional right to be free from cruel and unusual punishment are not the subject of these motions to dismiss and will proceed.

IV. CONCLUSION

For the foregoing reasons plaintiff's claims against defendants Pennsylvania State Police, Trooper Leo Luciani, Corrections Officer Robin Mensinger, Sergeant J.E. Paulukonis, Hearing Examiner Mary Canino, Business Manager L. Paul Burgard, Superintendent Martin L. Dragovich, and Supervisor John Doe are

dismissed.⁷ Appropriate orders follow.

⁷ Remaining defendants include Lieutenant David Novitsky, Sergeant Jeffrey Yurkiewicz, Corrections Officer Paul Androshick, Corrections Officer Bernard McCole, Corrections Officer James Zubris, and Corrections Officer Raymond Jones.