

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

THEODORE W. SCHELL, SR. : CIVIL ACTION  
v. :  
THOMAS J. RIDGE, et al. : NO. 97-6127

**MEMORANDUM AND ORDER**

BECHTLE, J. SEPTEMBER , 1999

Presently before the court is plaintiff Theodore W. Schell's ("Plaintiff") Motion for a Temporary Restraining Order and defendant Martin F. Horn's ("Horn") Motion for Summary Judgment and Response to Plaintiff's Motion for a Temporary Restraining Order. For the reasons set forth below, the court will deny Plaintiff's Motion for a Temporary Restraining Order and grant Horn's Motion for Summary Judgment.

**I. BACKGROUND**

Plaintiff brings this pro se civil rights action against defendant Commissioner of the Pennsylvania Department of Corrections, Martin F. Horn, individually and in his official capacities.<sup>1</sup> In an Order dated December 30, 1998, the court granted in part and denied in part defendants Ridge's and Horn's

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1. Plaintiff's Complaint also named Governor of Pennsylvania, Thomas J. Ridge ("Ridge") and four unidentified Correctional Emergency Response Team ("CERT") officers. The CERT officers were never identified or served and have not appeared in this action.

Motion to Dismiss. Plaintiff's sole remaining claim is that he has been denied medical treatment for injuries he sustained during a search of his cell.

In his Complaint and Motion for a Temporary Restraining Order, Plaintiff alleged that he was not receiving proper treatment for his spinal injuries and he requested that he be permitted to see a Neurosurgeon at the University of Pennsylvania. In its Order dated December 30, 1998, the court ordered that:

defendants Thomas J. Ridge and Martin F. Horn shall, within thirty (30) days from the date of this Order, take the deposition of plaintiff Theodore W. Schell regarding his medical treatment and shall respond to his request for relief regarding his medical treatment as set forth in the complaint and the motion for a temporary injunction.

Plaintiff had his deposition taken by telephone on January 19, 1999 and a copy was submitted to the court with Horn's Motion for Summary Judgment. In his deposition, Plaintiff stated that he received medical treatment for his spinal injuries, including physical therapy and prescription medication. (Pl.'s Dep. at 10-11.) In essence, Plaintiff's claims are based on the fact that his request to see a neurosurgeon was denied and that his prescription medication was discontinued on November 27, 1998. Id. at 10 & 13. Plaintiff presently has access to non-prescription pain relievers through the prison commissary. Id. at 14. Plaintiff also uses hot showers and hot towel compresses to relieve swelling in the neck and he also uses a cervical

collar while sleeping to relieve pressure on his spine. Id. at 16.

## **II. LEGAL STANDARD**

Summary judgment shall be granted "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." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

To defeat a motion for summary judgment, the non-moving party must produce evidence to establish prima facie each element of its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of his claim, the moving party is entitled to a judgment as a matter of law. Celotex, 477 U.S. at 322-23.

## **III. DISCUSSION**

In his Complaint, Plaintiff alleged that Ridge and Horn violated his constitutional rights guaranteed by the First,

Eighth and Fourteenth Amendments. Plaintiff seeks the following relief: (1) a declaratory judgment that Defendants' actions were unconstitutional; (2) compensatory damages; (3) punitive damages; and (4) several injunctions which require Defendants to provide Plaintiff with medical treatment at the University of Pennsylvania. As noted above, only Plaintiff's claim for medical treatment survives.

In order to establish a valid claim under 42 U.S.C. § 1983, a plaintiff must plead "the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1998) (citations omitted); see Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970) (restating requirements for establishing § 1983 claim); Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir 1993) (same).

A § 1983 claim must be based on a defendant's personal involvement in the constitutional violation. The Third Circuit has explained that a supervising officer is not personally liable under § 1983 unless he "participated in violating [plaintiff's] rights . . . directed others to violate them . . . acquiesced in his subordinates' violation . . . or tolerated past or ongoing misbehavior." Baker v. Monroe Township, 50 F.3d 1186, 1190 & n.3 (3d Cir. 1995); see Hampton v. Holmsburg Prison Officials, 546 F.2d 1077, 1082 (3d Cir. 1976) (holding that unless plaintiff demonstrates that each defendant participated in, or had

knowledge of and acquiesced in allegedly unlawful conduct, defendant cannot be held liable under § 1983). Plaintiff does not allege that Ridge and Horn personally participated in his medical treatment, in denying his request to see a neurosurgeon or in ceasing his prescription medication. Thus, Plaintiff cannot sustain a § 1983 claim against Ridge or Horn.

Furthermore, Plaintiff has failed to demonstrate a constitutional deprivation. A claim relating to the denial of proper medical care arises under the Eighth Amendment and requires that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 105 (1976). Plaintiff admits that he has received medical care for his injuries. However, he alleges that he should continue to receive prescription medication and should see a neurosurgeon. These allegations do not demonstrate a deliberate indifference to his medical needs. See Norris v. Frame, 585 F.2d 1183, 1186 (3d Cir. 1978) (stating that "[w]here the plaintiff has received some care, inadequacy or impropriety of the care that was given will not support an Eighth Amendment claim."); Palladino v. Wackenhut Corrections, No. 97-2401, 1998 WL 855489, at \*3 (E.D. Pa. Dec. 10, 1998) (stating that plaintiff's "claim is nothing more than a disagreement over the medical care that he should have received, and as such fails to allege the 'deliberate indifference to serious medical needs' necessary to state a claim under § 1983"). The fact that Plaintiff's condition is

ameliorated by non-prescription medication and heat compresses further demonstrates that he has not suffered a constitutional deprivation. Thus, Plaintiff's Eighth Amendment claim fails.

**IV. CONCLUSION**

For the reasons set forth above, the court will deny Plaintiff's Motion for a Temporary Restraining Order and grant Horn's Motion for Summary Judgment.

