

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

MOSES BOB PESSIMA : CIVIL ACTION  
 :  
 v. :  
 :  
 GEORGE WAGNER, et al. : NO. 97-1572

**MEMORANDUM AND ORDER**

BECHTLE, J.

OCTOBER , 1999

Presently before the court are: defendant Thomas Hogan's ("Hogan") unopposed motion for summary judgment; plaintiff Moses Bob Pessima's ("Pessima") Motion to Order Warden Tom Hogan, to Release Names, Pictures and Identification of Correctional Officers; Pessima's Motion for Leave to Include by Naming Other Defendants; defendant George Wagner's ("Wagner") unopposed motion for summary judgment; Pessima's Request for a Hearing Date; and the responses thereto. For the reasons set forth below, the court will: grant Hogan's motion for summary judgment; deny as moot Pessima's Motion to Order Warden Tom Hogan, to Release Names, Pictures and Identification of Correctional Officers; deny Pessima's Motion for Leave to Include by Naming Other Defendants; grant Wagner's motion for summary judgment; and deny Pessima's Request for a Hearing date.

**I. BACKGROUND**

On February 14, 1996, Pessima was accepted as a United States Immigration and Naturalization Services ("INS") prisoner at Berks County Prison. Defendant Wagner is the Warden at Berks County Prison and was the Warden there in 1996. On February 27,

1996, Pessima was accepted as an INS prisoner at York County Prison. (Hogan Aff. ¶ 1.) Defendant Hogan is the Warden at York County Prison and was the Warden there in 1996. Pessima was housed in the prison's gymnasium from his arrival date until March 8, 1996. (Hogan Aff. ¶ 2.) During that time, Pessima was classified as a non-criminal alien and was kept separate from other criminals housed at York County Prison. (Hogan Aff. ¶ 3.) After a disciplinary hearing on March 8, 1996, Pessima was placed in the prison behavioral adjustment unit. (Hogan Aff. ¶ 5.) Pessima was turned over to INS authorities on July 9, 1996. (Hogan Aff. ¶ 13.)

Pessima was readmitted to Berks County Prison on July 9, 1996. In August 1996, Pessima was found guilty at a disciplinary hearing for possessing petitions, which are not allowed and considered contraband at Berks County Prison. In December 1996, Pessima was found guilty at another disciplinary hearing for refusing to obey an order to close his cell door. On May 9, 1997, Pessima was granted asylum and released from Berks County Prison.

On March 4, 1997, Pessima filed his Complaint against Wagner, Scott Blackman and Lisa Dornell.<sup>1</sup> Hogan was not a named defendant in Pessima's March 4, 1997 Complaint. However, on January 6, 1999, Pessima sought to add Hogan as a defendant and

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<sup>1</sup> By Order dated June 22, 1999, the court dismissed without prejudice the claims against Scott Blackman and Lisa Dornell due to Pessima's failure to properly serve these defendants in accordance with the Federal Rules of Civil Procedure.

on February 2, 1999, Hogan filed his Answer.<sup>2</sup> On April 29, 1999, Hogan filed a motion for summary judgment. On July 6, 1999, Pessima moved the court for leave to Amend his Complaint to add defendants. Also on July 6, 1999, Pessima moved the court to order Hogan to release names, pictures and identification of correctional officers. On July 19, 1999, Wagner filed a motion for summary judgment. On July 23, 1999, Pessima requested a hearing date.

## 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).

On a motion for summary judgment, the non-moving party has the burden to 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

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<sup>2</sup> Hogan submitted to the court's jurisdiction over him by filing his Answer before the court ruled on Pessima's motion to add him as a defendant. See Order dated May 27, 1999 (denying as moot Pessima's motion to add Hogan as a defendant).

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 its claim, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-23.

### **III. DISCUSSION**

The court will address separately Hogan's motion for summary judgment, Pessima's Motion for Leave to Include by Naming Other Defendants and Wagner's motion for summary judgment.

#### **A. Hogan's Motion for Summary Judgment**

The court will grant Hogan's motion for summary judgment because any claim against him is barred by the statute of limitations. The Complaint contained two paragraphs concerning Hogan:

-That Officer John Doe, used force to remove me from "the gym" place of detention at the York County Prison, where there were more than sixty (60) of us refugees, housed in one place; with only two toilets and two showers (one toilet, was not functioning at the time). Where I told them during a count time that I am not a criminal; at a date and time documented but another inmate took from me while I was housed together with him at the EB10 place of detention.

-That York County Prison Warden Tom Hogan, allowed his officers to house me together with a man convicted for drug charges - who made my life miserable and unbearable, while I was imprisoned at the York County Prison.

(Compl. App. A at (v).)

Pessima seeks various forms of relief against Hogan under 42 U.S.C. § 1983. The Supreme Court has held that all

actions under § 1983 should be characterized as claims for personal injury for purposes of determining the applicable statute of limitations under state law. Wilson v. Garcia, 471 U.S. 261, 276-80 (1985). Under Pennsylvania law, the statute of limitations for a personal injury claim is two years. 42 Pa. Con. Stat. Ann. § 5524; see Smith v. City of Pittsburgh, 764 F.2d 188, 194 (3d Cir. 1985) (concluding that "appropriate limitation period for § 1983 actions brought in Pennsylvania is the two-year limitation provided by 42 Pa. Con. Stat. Ann. § 5524"); see also Kost v. Kozakiewicz, 1 F.3d 176, 189-90 (3d Cir. 1993) (same).

The injuries for which Pessima seeks relief occurred while he was housed at York County Prison between February 27 and July 9, 1996. However, Pessima did not seek to add Hogan as a defendant until January 6, 1999. Because Pessima failed to bring an action against Hogan within two years of the date of the injuries for which he seeks relief, his action against Hogan is barred by the statute of limitations.<sup>3</sup> Thus, the court will grant Hogan's motion for summary judgment and will deny as moot Pessima's motion to order Hogan to release names, pictures and identification of correctional officers.

**B. Pessima's Motion for Leave to Include by Naming Other Defendants**

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<sup>3</sup> In addition, the court finds no grounds for the addition of Hogan as a defendant to relate back to the date of the original Complaint under Federal Rule of Civil Procedure 15(c)(3).

The court will deny Pessima's Motion for Leave to Include by Naming Other Defendants. Pessima filed his Complaint on March 4, 1997. For the first time in this litigation, Pessima seeks to add Janet Reno (United States Attorney General), D. Bloom (Assistant Counsel, United States Immigration Service), Thomas Knepp (Correctional Officer, York County Prison), John Doe (1) (Correctional Officer, York County Prison), John Doe (2) Ramsey (Correctional Officer, York County Prison), D. Fister (Sergeant, York County Prison) and Marion Dillis (INS Representation, York County Prison).<sup>4</sup> (Mot. for Leave to Incl. by Naming Other Defs.)

Under the Federal Rules of Civil Procedure, a party may amend its pleading by leave of court, and "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Third Circuit has stated that "the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997); see Foman v. Davis, 371 U.S. 178, 182 (1962) (stating grounds that justify denial of leave to amend).

The court will deny Pessima's motion for leave to amend based on undue delay and futility. Pessima has not explained his delay of more than two years in seeking to add the defendants that are the subject of his motion. See Rashid v. Monteverde &

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<sup>4</sup> It appears that Thomas Knepp and D. Fister are employed at the Berks County Prison. (Wagner Mot. for Summ. J. at 2-3.)

Hemphill, No. 95-2449, 1997 WL 360922, at \*10 (E.D. Pa. 1997) (stating that "[a] court may deny a motion to amend based on undue delay when the movant is unable to 'satisfactorily explain' the reasons for delay") (citing Fishbein v. Family Partnership, 871 F. Supp. 764, 768 (D.N.J. 1997)). Furthermore, the addition of these defendants would be futile, as any action against them would be barred by the statute of limitations as discussed above. Thus, the court will deny Pessima's Motion for Leave to Include by Naming Other Defendants.

**C. Wagner's Motion for Summary Judgment**

The court will grant Wagner's motion for summary judgment. Pessima has not made any specific allegations regarding Wagner. Instead, the Complaint contains allegations regarding two corrections officers at Berks County Prison. Pessima complains that Officer Thomas Knepp: placed Pessima in the same cell with a regular inmate causing him fear of harm and loss of sleep; caused the incident leading to Pessima's August 1996 disciplinary hearing; and did not behave in a cordial manner toward Pessima. (Compl. Ex. A.) Pessima also complains that Sergeant D. Fister: confiscated his property which she considered to be "contraband;" has not returned that property; did not order his August 1996 disciplinary hearing early enough; dominated the disciplinary board at the hearing; publicly chastised him for writing on his own shoes; refused his request to be transferred to a different cell block; and did not provide him with the board game he requested for use by INS inmates.

(Compl. Ex. A.)

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 Gay v. Petsock, 917 F.2d 768, 771 (3d Cir. 1990) (finding nothing in record to suggest prison official was "involved in the acts complained of or that they were done with his knowledge and acquiescence"); Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (stating that defendant in civil rights action must have personal involvement in alleged wrongs). Pessima has presented neither allegations, nor evidence to suggest that Wagner was personally involved in any of the actions by Knepp or Fister about which Pessima complains. Moreover, Pessima has neither alleged, nor presented evidence to suggest that Wagner directed, acquiesced in, or tolerated the actions of these officers. Thus, the court will grant summary judgment in favor of Wagner.<sup>5</sup>

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<sup>5</sup> Because the court will grant the remaining defendants' motions for summary judgment, it will deny Pessima's request for a hearing date.

**III.        CONCLUSION**

For the foregoing reasons, the court will: grant Hogan's motion for summary judgment; deny as moot Pessima's Motion to Order Warden Tom Hogan, to Release Names, Pictures and Identification of Correctional Officers; deny Pessima's Motion for Leave to Include by Naming Other Defendants; grant Wagner's motion for summary judgment; and deny Pessima's Request for a Hearing date. An appropriate Order follows.



5. plaintiff Moses Bob Pessima's Request for a  
Hearing Date is DENIED.

IT IS FURTHER ORDERED that judgment is entered in favor  
of defendants Thomas Hogan and George Wagner and against  
plaintiff Moses Bob Pessima.

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LOUIS C. BECHTLE, J.