

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

VIVIAN NICHELSON : CIVIL ACTION
 :
 v. :
 :
 OFFICER REDWINE, et al., : NO. 99-1769

MEMORANDUM AND ORDER

BECHTLE, J. OCTOBER , 2000

Presently before the court is defendants Officer Redwine, et al.'s ("Defendants") Motion to Dismiss and plaintiff Vivian Nichelson's ("Plaintiff") response thereto. For the reasons set forth below, said motion will be granted.

I. BACKGROUND

In October 1997, Plaintiff was an inmate at the State Correctional Institution at Graterford. Plaintiff alleges that on October 8, 1997, he was not included in the evening head count. Plaintiff asserts that at the time of the institutional head count, he was at the Dental Clinic for an examination and consultation. Plaintiff asserts that Officer Redwine was responsible for the inmate head count in the infirmary and failed to include Plaintiff in his count. Plaintiff alleges that, as a result of Officer Redwine's error, Plaintiff was ordered out of the medical department, placed in administrative custody for fifty-six days and transferred to the State Correctional Institution at Coal Township. Plaintiff also alleges that he was not informed by the Program Review Committee regarding the reason for his administrative custody placement and transfer, and was

not given an opportunity to be heard on these decisions. Defendants filed the instant motion to dismiss on May 4, 2000, asserting that Plaintiff has failed to state a claim upon which relief may be granted.

II. LEGAL STANDARD

For the purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in a plaintiff's complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988). The court may also consider "matters of public record, orders, exhibits attached to the Complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (citations omitted). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). A complaint is properly dismissed only 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." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

Plaintiff asserts a claim against Defendants under 42 U.S.C. § 1983.¹ Plaintiff alleges that he was ordered out of the dental department during treatment for periodontal disease, placed in administrative custody for fifty-six days and transferred to the State Correctional Institution at Coal Township because of Officer Redwine's failure to include him in the evening head count on October 8, 1997. Plaintiff asserts violations of his constitutional rights to due process and equal protection. (Statement of Claim ¶¶ 1-8.) Plaintiff asserts that he had a liberty interest in remaining in the general prison population and a right to notice and to be heard regarding his placement in administrative custody. (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 6.) Plaintiff also alleges that he was transferred because he had exercised a "right" to seek medical treatment. Id. at 6-7. Defendants assert that the Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

¹ The statute reads, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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. . . .

42 U.S.C. § 1983.

Under the Fourteenth Amendment's Due Process Clause, a state shall not "deprive any person of life, liberty, or property, without due process of law." To establish a Fourteenth Amendment claim, a plaintiff must first establish that he was deprived of a liberty interest. Protected liberty interests "may arise from two sources--the Due Process Clause itself, and the laws of the states." Hewitt v. Helms, 459 U.S. 460, 466 (1983) (citing Meachum v. Fano, 427 U.S. 215, 223-27 (1976)).

Neither the Due Process Clause nor the laws of Pennsylvania give a convict a protected liberty interest in remaining in any particular housing status, in any particular state prison, or in any particular housing area within a state prison. The Supreme Court has consistently held that a convict does not have a Fourteenth Amendment liberty interest in a particular housing location or custody level while under the jurisdiction of correctional authorities. Hewitt, 459 U.S. at 466-67 (stating that argument that due process clause creates an interest in being confined to general population cell rather than more austere and restrictive administrative segregation quarters "draw[s] from the Due Process Clause more than it can provide"); Meachum, 427 U.S. at 225 (finding no liberty interest in remaining at lower security prison); Montanye v. Haymes, 427 U.S. 236, 243 (1976) (finding no liberty interest in avoiding transfer from one state prison to another for disciplinary reasons). Likewise, Pennsylvania law does not recognize a liberty interest in remaining free of administrative custody or transfer to

another prison. See 37 Pa. Code § 93.11(a) (stating that "[n]o inmate shall have a right to be housed in a particular institution or in a particular area within an institution"); Griffin v. Vaughn, 112 F.3d 703, 706 (3d Cir. 1997) (holding that transfer of Pennsylvania prisoner from general population to administrative custody for fifteen months is not the atypical and significant hardship necessary to establish protected liberty interest) (citing Sandin v. Conner, 515 U.S. 472 (1995)). Thus, the Complaint does not allege the deprivation of any constitutionally protected liberty interest under the due process clause.

Plaintiff alleges that he had a pass for an exploratory dental consultation and that Defendants infringed upon Plaintiff's "right" to seek and receive medical treatment. (Statement of Claim ¶ 7.) Plaintiff asserts that he was transferred "for exercising [this] constitutional right." Id.

To show a violation the Eighth Amendment, which governs the physical treatment of convicts, the convict must show that he was in serious pain, had a serious medical need, or was at a substantial risk of serious harm. See Farmer v. Brennan, 511 U.S. 825, 834 (1994) (recognizing that Eighth Amendment's prohibition of "Cruel and Unusual Punishments" is violated when convict shows that alleged deprivation was serious and that persons he sues were deliberately indifferent). However, the Complaint does not allege, as Plaintiff himself acknowledges, that Plaintiff was in serious pain or had a serious medical need.

(Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 7.)

Likewise, Plaintiff does not allege that anyone was deliberately indifferent to his medical needs.

Further, the Complaint does not adequately allege that Plaintiff's constitutional rights were violated when he was transferred to another prison because Plaintiff does not sufficiently allege unconstitutional reasons for the transfer. Rather, the Complaint alleges that Plaintiff was transferred because he was not included in the evening count. (Statement of Claim ¶ 1.) Thus, the Complaint does not sufficiently allege unconstitutional reasons for the transfer. Neither does it set forth specific, nonconclusory factual allegations that protected activity motivated the adverse act. See Halstead v. Motorcycle Safety Foundation Inc., 71 F.Supp.2d 464, 473 (E.D. Pa. 1999) (stating that complaint alleging action under § 1983 should state facts to show elements of cause of action and to provide defendants with adequate notice to frame answer) (citations omitted).

The Complaint also alleges that Defendants violated Plaintiff's rights to equal protection. However, the Complaint does not sufficiently allege a denial of equal protection because it does not allege that Plaintiff was treated differently from similarly situated convicts. The Complaint fails to identify any other similarly situated convict who was intentionally treated differently without a rational basis. Without averments of facts alleging a similarly situated person, how that person was treated

differently, and how the different treatment intentionally lacked a rational basis, a complaint states no violation of equal protection. See Artway v. Attorney General of New Jersey, 81 F.3d 1235, 1267 (3d Cir. 1996) (stating standard for equal protection violation).

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss will be granted.

An appropriate Order follows.

