

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

BOB KING : CIVIL ACTION  
 :  
 v. :  
 :  
 : No. 04-495  
 MARY LEFRIDGE-BYRD, et al. :

**ORDER-MEMORANDUM**

AND NOW, this 14<sup>th</sup> day of January, 2005, “Defendants’ Motion to Dismiss Plaintiff’s Complaint” is granted, with prejudice.<sup>1</sup> Fed. R. Civ. P. 12(b)(6).<sup>2</sup>

In this § 1983 action, filed pro se, SCI-Chester staff members<sup>3</sup> are alleged to have denied plaintiff Bob Kig prompt medical attention on January 29, 2002, when he was working in the kitchen as a prison inmate.<sup>4</sup> Complaint (styled “Memorandum of Law”), ¶¶ 8-12. According to plaintiff’s submission, several hours after his thumb was injured and continued to be in pain, he requested medical attention. However, his supervisor, Sheppard, “teased” him and “ignored” his complaints before permitting him to obtain treatment later that day - which delay violated his 8<sup>th</sup>

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<sup>1</sup> “If a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment unless an amendment would be inequitable or futile.” Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004), citing Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002). For the reasons discussed below, amendment by plaintiff would be futile.

<sup>2</sup> “A court should not dismiss a complaint under Rule 12(b)(6) for failure to state a claim for relief ‘unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claims which would entitle him to relief.’ . . . [The court must] accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” U.S. ex rel. Schmidt v. Zimmer, Inc., 386 F.3d 235, 240 (3d Cir. 2004) (citations omitted).

<sup>3</sup> Defendants are Al Sheppard (kitchen supervisor), Eloise McGee (kitchen manager), Shirley Laws-Smith (Correctional Health Care Administrator), and Mary K. Leftridge-Byrd (Superintendent).

<sup>4</sup> Plaintiff is currently incarcerated at SCI-Graterford.

Amendment rights. Id. at ¶¶ 13-19, 21. Further, plaintiff received inadequate care, for which he asserts a gross negligence/medical malpractice claim against Laws-Smith. Id. at ¶¶ 21, 26, 28, 32. On February 1, 2002, plaintiff filed a grievance with McGee. He contends that the belatedness of her response - filed in May 2002 - violated his 1<sup>st</sup> and 14<sup>th</sup> Amendment rights. Id. at ¶¶ 22, 27, 29-31, 33. Having unsuccessfully appealed McGee’s denial of his grievance, he contends that Leftridge-Byrd’s response, filed in June 2002, was also untimely. Id. at ¶ 33.

For the following reasons, plaintiff’s claims must be dismissed:

- Failure to respond promptly to a prisoner’s grievance does not amount to a constitutional violation. See Lentz v. Vaughn, 2004 WL 556692, at \*2 (E.D. Pa., Mar. 11, 2004), citing Rauso v. Vaughn, 2000 WL 873285, at \*16 (E.D. Pa., June 26, 2000). Because McGee and Leftridge-Byrd are not alleged to have participated in any actionable conduct other than not filing timely responses to plaintiff’s grievances, the claims against them must be dismissed. See Lentz, supra, at \*2.
- Plaintiff’s tort claims are barred by sovereign immunity because defendants at all relevant times were acting within the scope of their duties. See Moore v. Commonwealth, 538 A.2d 111, 115 (Pa. Cmwlth. 1998), appeal denied, 546 A.2d 60 (Pa. 1988).<sup>5</sup>
- Defendants McGee, Laws-Smith and Leftridge-Byrd are non-medical prison officials and are not alleged to have known of any claimed delay in medical attention prior to plaintiff’s filing of the grievance. They are not “chargeable with the Eighth Amendment scienter requirement of deliberate

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<sup>5</sup> Though the complaint purports to set forth a medical malpractice claim against Laws-Smith - and such claims are not barred by sovereign immunity, see 42 Pa.C.S.A. § 8522(b) - Laws-Smith is not alleged to have provided medical treatment. Instead, she appears to be an administrator, not a medical professional. See, e.g., Complaint, Exhibit “H” (memo to Laws-Smith from plaintiff requesting information on alternative pain medication on advice of “Dr. Nicholson,” the physician apparently treating plaintiff). She, therefore, is not subject to a medical malpractice claim.

indifference.” Spruill v. Gillis, 372 F.3d 218, 236 (3d Cir. 2004) (“If a prisoner is under the care of medical experts . . . a non-medical prison official will generally be justified in believing that the prisoner is in capable hands.”). The 8<sup>th</sup> Amendment claims against them must, therefore, be dismissed.

- As to Sheppard, though he is alleged to have delayed plaintiff’s treatment, see Complaint, ¶¶ 14-19, plaintiff admits having received medical attention on the day of his injury, together with further medication as needed. See Complaint, ¶¶ 21, 26, 28, 32 (continuing complaints of pain and receipt of Tylenol and Motrin). There is no allegation of permanent loss or handicap resulting from the injury or delay in treatment. See Complaint. Under the law: “Only ‘unnecessary and wanton infliction of pain’ or ‘deliberate indifference to the serious medical needs of prisoners are sufficiently egregious to rise to the level of a constitutional violation.” Spruill, 372 F.3d at 235, quoting White v. Napoleon, 897 F.2d 103, 108-09 (3d Cir. 1990). See also Estelle v. Gamble, 429 U.S. 97, 106 (1976) (facts alleged must show “deliberate indifference to serious medical needs”); Monmouth County Correctional Institution Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (medical need is serious “where denial or delay [of treatment] causes the inmate to suffer a life-long handicap or permanent loss,” or “is so obvious that a lay person would easily recognize the necessity for a doctor’s attention.”). Sheppard’s conduct, as alleged, does not rise to the requisite level of deliberate indifference, nor does plaintiff’s injury demonstrate a serious medical need. This 8<sup>th</sup> Amendment claim must also be dismissed.

BY THE COURT:

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Edmund V. Ludwig, J.