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

PETER LINZY HARMON	:	CIVIL ACTION
	:	
v.	:	
	:	
C/O DIVIRGILIS, et al.	:	NO. 04-1813

MEMORANDUM

Baylson, J. **February 16, 2005**

This prisoner civil rights action pursuant to 42 U.S.C. §1983 involves Plaintiff's claims against Defendant Correctional Officers Divirgilis, Neal, Pasquale, and Moss for alleged use of excessive force during an incident at G.W. Hill Correctional Facility on March 20, 2004. Plaintiff also claims that his due process rights were violated by Defendants Hearing Examiner Abt (incorrectly identified in some documents as "Appy"), Captain B. Boyer, Major Levandowski – the Major of the Institution at G.W. Hill, and Bob Burgwald (incorrectly identified in some documents as "Bob Bergoff"). Plaintiff's Complaint additionally makes claims against Defendant GEO Corporation as the trainer and supervisor of the correctional officers. Plaintiff also alleges unlawful denial of medical treatment by Defendants. For the reasons that follow, Defendants' Motion to Dismiss will be granted in part and denied in part.

I. Background

Plaintiff Peter Linzy Harmon ("Plaintiff"), a state prisoner, filed this Complaint *pro se* against Defendants, all employees of the Pennsylvania Department of Corrections, on June 9, 2004. Plaintiff alleges that on March 20, 2004, Plaintiff's mother, fiancée, and stepson were visiting Plaintiff at G.W. Hill. Plaintiff concedes that during the visit he "popped" his stepson

but alleges that he and his stepson were "play boxing." According to Plaintiff, Defendant Divirgilis then informed Plaintiff that his visit was being ended, and Plaintiff requested to say goodbye to his mother. According to Plaintiff's Complaint, when Defendant Pasquale would not get out of Plaintiff's way to allow him to say goodbye to his mother, Defendant Divirgilis tackled Plaintiff and placed him on top of Defendant Pasquale on the visiting room table, after which ten guards arrived and begin twisting his arms and holding him down. Defendant Moss allegedly grabbed Plaintiff's arm, scratching him and digging into his arm. Defendant Neal allegedly bent and twisted Plaintiff's right foot. Plaintiff alleges that he offered no resistance and that any difficulty the correctional officers had securing handcuffs on Plaintiff during the incident was due to his large size.

On March 22, 2004, Plaintiff was served a Disciplinary Action Report, which he refused to sign on the grounds that he did not receive notice of written charges against him within 24 hours of staff becoming aware of the incident, as required by the Inmate Handbook for the G.W. Hill. According to Plaintiff's Complaint, when he attended his misconduct hearing on March 26, 2004, he asked Defendant Apt if she had reviewed the visiting room tape from March 20, and she replied that she didn't need to.[1] At the hearing, Plaintiff was found guilty of all misconduct charges and received disciplinary detention for a period of 60 days and 90 screened special visits.

Plaintiff's Complaint alleges that, as a result of the incident on March 20, his wrists were swollen with several cuts and his arms were cut. The Complaint alleges that Plaintiff has

[1]Although Plaintiff refers in several places to a video tape of the incident in the visiting room, the defendants' reply brief indicates that the cameras in the visiting rooms are for monitoring purposes only and that the incidents at issue in the case were not recorded. (Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss, p. 1).

nightmares about what occurred, cannot eat or sleep, has had to see a psychologist, and has lower back pain. In his answer to Defendants' Motion to Dismiss, Plaintiff alleges that due to his lower back pain, he was x-rayed on or around May 20, 2004, and that he has taken Moltrins, Extra Strength Tylenols, and Baclofen, a muscle relaxant, as ordered by a doctor at G.W. Hill. Plaintiff alleges that he did not receive sufficient medical treatment for his lower back pain and that his initial sick call slips were ignored.

Plaintiff's claims against Defendants Apt, Boyer, Major Levandowski, and Bob Burgwald, arise out of the prison disciplinary process. Plaintiff alleges that the 60 days of disciplinary detention and 90 screened visits constituted arbitrary punishment, and that the alleged failure to respond to Plaintiff's further grievances regarding the disciplinary process violated his due process rights. Plaintiff also alleges unlawful denial of medical treatment by Defendants on the basis of the allegedly ignored sick call slips and insufficient treatment for back pain. Plaintiff brings additional claims against Defendant GEO Corporation as the trainer and supervisor of the correctional officers. Plaintiff seeks compensatory and punitive damages.

On August 9, 2004, Defendants moved to dismiss the Complaint on the grounds that Plaintiff has failed to state a legally cognizable claim for which relief can be granted. On August 19, 2004, Plaintiff filed a responsive brief, and Defendants' reply brief was filed on September 30, 2004.

II. Legal Standard

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939,

944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). In cases where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally. Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997).

III. Discussion

a. Excessive Use of Force Claims Against Defendants Divirgilis, Neal, Pasquale, and Moss

To evaluate a constitutional claim for violation of a plaintiff's Eighth Amendment rights by use of excessive force, the Court must inquire "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Smith v. Mensinger, 293 F.3d 641, 649 (3d Cir. 2002)(quoting Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2002)). The Court must consider: "(1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of injury inflicted; (4) the extent of threat to safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them; and (5) any efforts made to temper the severity of the response." Id. (quoting Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2002)).

As a general rule, "there is no constitutional violation for 'de minimus uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.'" Brooks, 204 F.3d at 107 (quoting Hudson v. McMillan, 503 U.S. 1, 9-10 (1992)). This Court has therefore refrained from finding a constitutional violation in cases where the force used was "*de minimus* and objectively reasonable under the circumstances." Smith v. Horn, 2004 WL 574131,

*2 (E.D. Pa. 2004). At the motion to dismiss stage, however, "to state a claim, the plaintiff need only allege that force was maliciously applied to cause harm." Wesley v. Dombrowski, 2004 WL 1465650 *6 (E.D. Pa. 2004).

Here, if Plaintiff's allegations are accepted as true, as they must be on a motion to dismiss, the correctional officers misinterpreted the interaction between Plaintiff and his stepson, and Plaintiff did not resist the abrupt termination of the visit. The alleged use of force was therefore unreasonable under the circumstances and allegedly maliciously applied to cause harm. As to whether the force applied was *de minimus,* Plaintiff's alleged injuries – swollen wrists, cuts on his arms and wrists, and persistent lower back pain – do not in and of themselves indicate that the force applied rises to the level of an Eighth Amendment violation. However, "the absence of significant resulting injury is not a per se reason for dismissing a claim based on alleged wanton and unnecessary use of force against a prisoner." Brooks, 204 F.3d at 108. Therefore, "[a]lthough the extent of an injury provides a means of assessing the legitimacy and scope of the force, the focus always remains on the force used (the blows)." Id.; Smith, 293 F.3d at 649 ("*de minimus* injuries do not necessarily establish *de minimus* force").

Here, the severity of the misconduct alleged by Plaintiff indicates that the force applied by Defendants was not necessarily *de minimus.* Plaintiff alleges that the officers unnecessarily tackled him and twisted his arms and legs, causing cuts and swelling. He also alleges that the incident resulted in chronic lower back pain, for which he has been medicated. Therefore, if, as Plaintiff alleges, the use of force was not objectively reasonable under the circumstances and was not *de minimus,* such use of force may constitute a violation of the Eighth Amendment. Defendants' Motion to Dismiss will therefore be denied as to the excessive use of force claim.

After discovery, the Court may examine the evidence in dispositive motions.

b. Due Process Claims Against Defendants Abt, Boyer, Levandowski, and Burgwald

Plaintiff alleges that his due process rights were violated during the disciplinary process by the punishment of 60 days of disciplinary detention and 90 screened visits imposed and by the failure to respond to his grievances following the imposition of this punishment. The Third Circuit has held, however, that being held in segregated confinement for punitive reasons does not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" in such as way as to create a liberty interest to which due process requirements would apply. Griffin v. Vaughn, 122 F.3d 703, 706 (3d Cir. 1997)(quoting Sandin v. Connor, 515 U.S. 472 (1995)). The court stated that "[g]iven the considerations that lead to transfers to administrative custody or inmates at risk from others, inmates at risk from themselves, and inmates deemed to be security risks, etc., one can conclude with confidence that stays of many months are not uncommon." Id. at 708. The Third Circuit has since elaborated that determining whether an "atypical and significant hardship" exists under Sandin requires consideration of two factors: "1) the amount of time the prisoner was placed into disciplinary segregation; and 2) whether the conditions of his confinement in disciplinary segregation were significantly more restrictive that those imposed on other inmates in solitary confinement." Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000).

Here, because Plaintiff faced only 60 days in disciplinary detention and does not allege that the conditions of his confinement were significantly more restrictive that those imposed on other inmates in solitary confinement, he fails to state a cognizable constitutional claim regarding

his punishment. See Gregg v. Smith, 1998 WL 309860 *4 (E.D. Pa. 1998)("Because plaintiff has no liberty interest which was deprived by sixty days of disciplinary confinement, he had no right to due process and thus has failed to present a cognizable constitutional claim regarding that confinement.")(citations omitted)).

As to Plaintiff's allegations of ignored grievances following the disciplinary hearing, while Plaintiff was understandably frustrated by the outcome of the hearing, there is no constitutional right to administrative review of prison disciplinary proceedings. Garfield v. Davis, 566 F. Supp. 1069, 1074 (E.D. Pa. 1983). Plaintiff's due process claims against Hearing Examiner Abt, Captain B. Boyer, Major Levandowski, and Bob Burgwald therefore fail to state a claim for which relief can be granted and must be dismissed.

c. Medical Mistreatment Claim[2]

This Court has recently noted that "[t]o state a cognizable claim for medical mistreatment under the Eighth Amendment, 'a prisoner must allege acts or omissions sufficiently harmful to evidence a deliberate indifference to serious medical needs.'" Wesley v. Dombrowski, 2004 WL 1465650 *5 (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). The Third Circuit has clarified that the two-pronged analysis of "the *Estelle* standard requires deliberate indifference on the part of the prison officials and it requires the prisoner's medical needs to be serious." Spruill v. Gillis, 372 F.3d 218, 235-36 (3d Cir. 2004).

The second prong – the serious medical need element – "is an objective factor the Court determines is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would note the need for medical

[2]It is unclear against which Defendants the medical malpractice claims are brought, but the Court finds, as discussed below, that the Complaint fails to allege the required deliberate indifference as to any Defendant, so the claim must fail.

attention." Wesley, 2004 WL 1465650 *5 (quotations and citations omitted). In Spruill, the Third Circuit found that a back condition that "allegedly required significant and continuous medication, and has caused [the plaintiff] excruciating pain" fulfilled this requirement. Id. at 236. Although Plaintiff does not allege back pain as significant as that described in Spruill, the Court cannot say that Plaintiff's allegations could not meet the serious medical need requirement.

As to the first prong of "deliberate indifference," however, Plaintiff has failed to show that any defendant "disregarded a known and obvious consequence of his action." Wesley, 2004 WL 1465650 *5. Although Plaintiff alleges that his initial sick call slips were ignored, Plaintiff does not allege that any of the named Defendants were involved, and Plaintiff concedes he was eventually x-rayed and has taken the muscle relaxants and pain relievers prescribed by a prison doctor. Plaintiff brings no claims against the doctor. Even assuming the truth of Plaintiff's allegations, then, these allegations do not suggest that any of the Defendants showed deliberate indifference to Plaintiff's medical needs by disregarding a known and obvious consequence of his actions. As in Spruill, Plaintiff "does not allege that his condition was so dire and obvious that [Defendants'] failure to summon immediate medical attention . . . amounted to deliberate indifference [and] [t]he facts as [Plaintiff] himself describes them simply do not amount to . . . deny[ing] reasonable request for medical treatment . . . expos[ing] the inmate to undue suffering or knowledge of the need for medical care coupled with an intentional refusal to provide that care." Spruill, 372 F.3d at 237 (quotations and citations omitted). Plaintiff's claims regarding the alleged medical mistreatment must therefore be dismissed.

d. Claims Against Defendant GEO Corporation

In this Circuit, supervisory liability cannot rise to the level of a constitutional violation under §1983 unless the Defendant was personally involved in the alleged misconduct. Urrutia v.

Harrisburg County Police Department, 91 F.3d 451, 453 (3d Cir. 1996); Johnson v. Miller, 925 F. Supp. 334, 341 (E.D. Pa. 1996). Plaintiff makes no allegations that Defendant GEO Corporation was directly involved in the correctional officers' conduct on March 20, 2004, the only alleged conduct that the Court finds states a constitutional claim. Therefore, Plaintiff's claims against GEO Corporation must be dismissed.

VI. Conclusion

For the reasons above stated, Defendants' Motion to Dismiss will be denied as to Plaintiff's claims against Defendants Divirgilis, Neal, Pasquale, and Moss, for the alleged use of excessive force, and granted as to all other claims and defendants.

An appropriate Order follows.

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

PETER LINZY HARMON	:	CIVIL ACTION
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v.	:	
	:	
C/O DIVIRGILIS, et al.	:	NO. 04-1813

ORDER

AND NOW, this 16th day of February, 2005, it is hereby ORDERED as follows:

1. Defendants' Motion to Dismiss is DENIED as to Plaintiff's claims against Defendants Divirgilis, Neal, Pasquale, and Moss for the alleged use of excessive force, and GRANTED as to all other claims and Defendants.

2. Defendants shall file an Answer within twenty (20) days.

3. In connection with the request of Plaintiff that an attorney be appointed, the Clerk is directed to refer this case to the Prisoner Civil Rights Pro Se Panel of Attorneys.

4. Discovery shall start immediately, and it is suggested that the parties exchange relevant documents as are requested within thirty (30) days from the date of this Order. Depositions should then be scheduled if requested.

5. Discovery shall be completed no later than May 31, 2005.

6. Any dispositive motions shall be filed no later than June 10, 2005.

7. Plaintiff's pretrial memorandum is due June 17, 2005. Defendants' pretrial memorandum is due June 24, 2005.

8. The case will enter the Court's trial pool as of July 18, 2005.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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