

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

ALTON D. BROWN	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
MONTGOMERY COUNTY, <u>et al.</u>	:	No. 04-5729

**MEMORANDUM AND ORDER**

HUTTON, S.J.

May 26, 2005

Plaintiff Alton D. Brown filed this section 1983 action pro se against Montgomery County, twelve named Defendants, and nineteen additional unknown Defendants. The following Defendants have filed the Motion to Dismiss presently before the Court: Montgomery County, James Matthews, Thomas Jay Ellis, Ruth S. Damsker, William Mower, Jr., Bruce L. Castor, Jr., John P. Durante, Deputy White, Corporal Bauer, Patricia E. Coonahan, and Warden Lawrence V. Roth, Jr. Also before the Court is Plaintiff's Motion to Amend the Complaint.

**I. BACKGROUND**

Plaintiff initiated this suit on December 10, 2004 by filing a petition to proceed in forma pauperis. The petition was granted and Plaintiff filed his Complaint on January 12, 2005. Plaintiff's Complaint contains three counts of unnecessary use of force, three counts of unnecessary use of force and cruel and unusual punishment, one count of cruel and unusual punishment, and one count of conspiracy. Defendants now move, pursuant to Federal Rule

12(b)(6), to dismiss Counts One, Two, Three, and Seven and all other claims against Defendants Matthews, Ellis, Damsker, Castor, Coonahan, Roth, and Durante.

## **II. LEGAL STANDARD**

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. See Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993). When considering a 12(b)(6) motion, the Court must accept as true all facts alleged in the complaint and any reasonable inferences that can be drawn from them. See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989); see also Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001). Claims by pro se litigants may be 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." McDowell v. Delaware State Police, 88 F.3d 188, 189 (3d Cir. 1996) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972)). Furthermore, when a complaint is filed pro se, a court must "apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name." Holley v. Dep't of Veteran Affairs, 165 F.3d 244, 247-48 (3d Cir. 1999).

## **III. DISCUSSION**

### **A. Counts One, Two, and Three**

Section 1983 imposes civil liability on any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States. See 42 U.S.C. § 1983. Section 1983 does not create a substantive right, but provides a remedy for the violation of a federal Constitutional or statutory right. See Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979). To establish a violation of § 1983, a plaintiff must prove that: (1) the defendant has deprived him of a right secured by the Constitution or the laws of the United States; and (2) the defendant deprived him of that right acting under color of law. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982).

Defendants move to dismiss the first three counts of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because they are time-barred. The appropriate statute of limitations in a § 1983 action is the state's statute of limitations for a personal injury claim. See Wilson v. Garcia, 471 U.S. 261, 280 (1985); see also Sameric Corp. of Delaware v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998). In Pennsylvania, the statute of limitations for a personal injury claim, and therefore a § 1983 claim, is two years. See Herbert v. Reinstein, 976 F. Supp. 331, 336 (E.D. Pa. 1997). The statute of limitations on a § 1983 action accrues on the date when the plaintiff "knew or should have known his or her rights had been violated." Herbert,

976 F. Supp. at 336 (quoting Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991)). Here, the first three counts allege three different incidences of the use of unnecessary force. Count One relates to events that allegedly occurred on November 19, 1997, Count Two describes events that alleged occurred on January 8, 1998, and Count Three discusses events that allegedly occurred on September 22, 2000. See Pl.'s Compl. ¶¶ 1, 9, 14. As Plaintiff did not file his Complaint before September 22, 2002, Counts One through Three do not meet the two year statute of limitations requirement and are time barred.

Plaintiff argues that the Court should permit Plaintiff to amend his Complaint to cure the statute of limitations problem. Under Federal Rule of Civil Procedure 15(a), "leave to amend shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Court has discretion in deciding whether to grant Plaintiff's motion for leave to amend and can deny the motion on the grounds of "undue delay, bad faith, dilatory motive, prejudice, [or] futility." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). In evaluating the motion on futility grounds, the Court "applies the same standard of legal sufficiency as it applies under Rule 12(b)(6)." Id. at 1434. Here, Plaintiff wishes to amend his Complaint to include facts establishing that the discovery rule should apply to toll the statute of limitations. Under the discovery rule, a § 1983 claim accrues "as soon as a

potential claimant either is aware, or should be aware, of the existence of and source of an injury." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994). A "claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong." Oshiver, 38 F.3d at 1386. Here, the first three Counts of Plaintiff's Complaint contain allegations of excessive force; therefore, Plaintiff knew of the injuries that gave rise to each of these claims on the date each incident occurred. See Walker v. Fischer, 2005 WL 147484, \*2 (E.D. Pa. Jan. 21, 2005) (holding that plaintiff's claim of excessive force during arrest accrued on date of arrest). The discovery rule is inapplicable in this situation and allowing Plaintiff to amend his Complaint on this ground is futile. Therefore, the first three Counts of Plaintiff's Complaint are dismissed in their entirety.

**B. Count Seven**

In Count Seven Plaintiff alleges that Defendants Castor, Durante, Coonahan, Ellis, Matthews, Damsker, Salus, Albright, Mower, and Bauer conspired to "prevent plaintiff from receiving post conviction relief by using intimidation, assaults, and cruel conditions." Pl.'s Compl. ¶ 49. Plaintiff further states that "these defendants have a practice of conspiring against minority races in attempts to deny them due process of law in Montgomery County Courts." Pl.'s Compl. ¶ 51. Reading the amended Complaint

liberally, the Court construes Count Seven to be either a claim for conspiracy under § 1983 or a conspiracy claim under § 1985(3).

In order to state a claim for civil conspiracy under § 1983, Plaintiff must allege that: (1) "defendants deprived him of a right secured by the Constitution or laws of the United States," and (2) defendants "conspired to do so while acting under color of state law." Dennison v. Pa. Dep't of Corrections, 268 F. Supp. 2d 387, 401 (M.D. Pa. 2003). A complaint alleging a conspiracy under § 1983 must "contain sufficient information for the court to determine whether or not a valid claim for relief has been stated and to enable the opposing side to prepare an adequate responsive pleading." Loftus v. Southeastern Pennsylvania Transp. Auth., 843 F. Supp. 981, 986 (E.D. Pa. 1994). Further, the court held in Loftus that to plead a conspiracy under Federal Rule of Civil Procedure 8(a), a plaintiff must "plead with particularity the circumstances . . . such as . . . the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose." Loftus, 843 F. Supp. at 986-87.

To establish a claim under 42 U.S.C. § 1985(3), Plaintiff must allege (1) a conspiracy; (2) motivated by a racial animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the

deprivation of any right or privilege of a citizen of the United States. See Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997). Section 1985(3) by itself does not create substantive rights but rather "serves as a vehicle for vindicating federal rights and privileges which have been defined elsewhere." Brown v. Philip Morris Inc., 250 F.3d 789, 805 (3d Cir. 2001).

In Count Seven, it is unclear exactly what right Plaintiff alleges Defendants entered into a conspiracy to violate. However, the Court need not determine exactly what right is at issue because Plaintiff has failed to allege a conspiracy under either § 1983 or § 1985(3). The Complaint concludes that Defendants "conspired or supported the conspiracy" and that Defendants have a "practice of conspiring against minority races in attempts to deny them due process of law in Montgomery County Courts." Pl.'s Compl. ¶¶ 49, 51. Plaintiff's allegations must include a description of the membership, formulation and purpose of the alleged conspiracy. See Scott v. Township of Bristol, 1990 WL 178556, \*5 (E.D. Pa. Nov. 14, 1990). However, there are no facts in Count Seven, or elsewhere in the Complaint, to direct the Court to the object of alleged conspiracy, the period of the alleged conspiracy, or any specific actions or statements of the individuals involved. To state a claim for conspiracy under § 1983, Plaintiff must at least provide the Court with facts "suggesting that there was a mutual understanding among the conspirators to take action directed toward an

unconstitutional end." Wesley v. Hollis, 2004 WL 945134, \* 4 (E.D. Pa. April 29, 2004). Plaintiff has not done this.

Plaintiff seeks to amend his Complaint to "add facts in support of his conspiracy claim." Pl.'s Mot. to Amend ¶ 2. The Third Circuit has cautioned that "'failure to permit amendment of a complaint dismissed for want of specific allegations constitutes an abuse of discretion.'" Scott v. Township of Bristol, 1990 WL 178556, \*5 (E.D. Pa. Nov. 14, 199)(citing Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1981)). Accordingly, Defendants' Motion to Dismiss Count Seven is granted without prejudice and Plaintiff is granted leave to amend his Complaint regarding Count Seven.

**C. Remaining Counts Against Defendants Matthews, Ellis, Damsker, Durante, Castor, Coonahan, and Roth**

Defendants move to dismiss all claims against each of the above named Defendants for failure to state a claim under Rule 12(b)(6). Plaintiff does not indicate whether he is suing each Defendant in his or her personal or official capacity. However, Defendants argue that Plaintiff's claims fail regardless of whether they are brought against Defendants in their official capacity or personal capacity.

In Kentucky v. Graham, 473 U.S. 159 (1985), the Supreme Court discussed the differences between a suit against a public official in his personal capacity and in his official capacity. See id. at 166. The Court noted that personal capacity actions seek to impose

liability on the government official for actions he takes under color of state law, while official capacity actions represent another way to sue the municipality of which the officer is an agent. See id. Although an action brought against both the entity and the public official in his or her official capacity is redundant, the Court ultimately has discretion in deciding whether to dismiss the claims against the individual defendants. See Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 432 (E.D. Pa. 1998). Furthermore, a claim that is redundant is not necessarily invalid under Rule 12(b)(6). See id. In Scott v. Township of Bristol, 1990 WL 178556 (E.D. Pa. Nov. 14, 1990) (Hutton, J.), this Court refused to dismiss the plaintiff's claims against individual defendants in their official capacity and the Court will do the same here. See id. \*11. Accordingly, Defendants' Motion to Dismiss all claims against Defendants Matthews, Ellis, Damsker, Durante, Castor, Coonahan, and Roth in their official capacities is denied.

To establish personal liability, Plaintiff must show the official deprived him of a federal right while acting under color of state law. See Demarco v. Dep't of Corrections, 1999 WL 997751, \*5 (E.D. Pa. Nov. 2, 1999). Additionally, a supervisor is personally liable for a violation committed by a subordinate only when the supervisor was personally involved in the violation. See Pahle v. Colebrookdale Township, 227 F. Supp. 2d 361, 369 (E.D. Pa.

2002). The Third Circuit has stated that "personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence . . . must be made with appropriate particularity" Roe v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988); see also Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995). The Court will examine each of the remaining four counts of Plaintiff's Complaint to determine if they state a claim against any named Defendant in his or her personal capacity.

**1. Count Four**

In Count Four of Plaintiff's Complaint, he alleges that he was "assaulted by two unknown deputies in a restroom . . . during the transport from Montgomery County to Pittsburgh." Pl.'s Compl. ¶ 28. Regarding Defendants Ellis, Matthews, Damsker, Durante, and Castor, Plaintiff states that they "supported" the "Defendants . . . routine practice/custom of assaulting and using intimidation on minority defendants and their attempts to punish and discourage them from attacking their convictions." Pl.'s Compl. ¶ 33. To the extent that Plaintiff is bringing Count Four against Defendants in their individual capacity, taking all allegations in Plaintiff's Complaint as true, Plaintiff has stated a claim against Defendants in their individual capacities sufficient to survive the motion to dismiss.

**2. Count Five**

In Count Five of Plaintiff's Complaint, Plaintiff alleges that Defendants White and an Unknown black deputy used excessive force on September 29, 2004 when transporting Plaintiff from SCI-Fayette to Montgomery County Jail. Pl.'s Compl. ¶ 36. Plaintiff also states that "Montgomery County Sheriff's [sic] have a routine practice of punishing, intimidating, and retaliating against minority prisoner/defendants, which is approved of by Defendants Ellis, Matthews, Damsker, Durante, and Caster [sic]." Pl.'s Compl. ¶ 39. To the extent that Plaintiff is bringing Count Five against Defendants in their individual capacity, taking all allegations in Plaintiff's Complaint as true, Plaintiff has stated a claim against Defendants by alleging that they have approved of the behavior at the Montgomery County Sheriff's Office.

### **3. Count Six**

In Count Six Plaintiff alleges that he was assaulted in a holding cell at Montgomery County Courthouse "with a hand-held stun-gun by Defendants Bauer, White, Unknown Black Deputy, and approximately ten (10) unknown deputies." Pl.'s Compl. ¶ 42. Plaintiff also stated that the "Montgomery County Sheriff department has a routine practice of punishing, intimidating, and retaliating against minority defendants, which is approved of by defendants Ellis, Matthews, Damsker, Durante, and Caster [sic]." Pl.'s Compl. ¶ 47. To the extent that Plaintiff is bringing this action against Defendants in their individual capacity, taking all

allegations in Plaintiff's Complaint as true, Plaintiff has stated a claim against Defendants by alleging that they approved of the behavior at issue in Count Six.

#### **4. Count Eight**

In Count Eight, Plaintiff alleges cruel and unusual punishment each time he was housed in Montgomery County Prison because he was "denied exercise, showers, medical care, change of clothing and bedding, phone calls, and adequate food." Pl.'s Compl. ¶ 53. Plaintiff also alleges that this treatment was "applied by Defendant's [sic] Warden and three (3) Lieutenants for the purpose of sabotaging his ability to litigate his appeal, intimidation, discouragement, punishment and retaliation for attacking his convictions, in conspiracy with defendants Castor, Durante, Coonahan, Salus, and Albright." Pl.'s Compl. ¶ 54(a). Additionally, Plaintiff states that "Montgomery County Jail staff has a history, practice/custom of retaliating against minority defendants, using intimidation, and punishing them in attempts to sabotage and prevent appeals, which is supported by Defendants Ellis, Matthews, and Damsker." Pl.'s Compl. ¶ 54(b).

The Court finds that Count Eight is an attempt to state a claim of cruel and unusual punishment under the Eighth Amendment and conspiracy to violate Plaintiff's rights under the Eighth Amendment. Under the Eighth Amendment, "prison officials must ensure that inmates receive adequate food, clothing, shelter, and

medical care, and must take reasonable measures to guarantee the safety of the inmates." Farmer v. Brennan, 511 U.S. 825, 832 (1994). To state a claim under the Eighth Amendment, Plaintiff must allege a deprivation that is "'sufficiently serious' such that the prison official's act or omission resulted 'in the denial of the minimal civilized measure of life's necessities.'" Booth v. King, 346 F. Supp. 2d 751, 758 (E.D. Pa. 2004)(quoting Farmer, 511 U.S. at 834). Plaintiff must also allege that the prison official had "deliberate indifference to inmate health or safety." Id.

Here, Plaintiff stated that as a result of Defendants actions, "Plaintiff suffered loss of weight, hunger, pain, anxiety, fear, despair, and physical pain." Pl.'s Compl. ¶ 55. The Court finds that this is "sufficiently serious" to satisfy the first prong at the motion to dismiss stage. Plaintiff also satisfies the deliberate indifference prong by stating that Defendants applied this treatment "for the purpose of sabotaging [Plaintiff's] ability to litigate his appeal, intimidation, discouragement, punishment and retaliation for attacking his conviction." Pl.'s Compl. ¶ 34. Without evaluating the underlying merits of the claim, but noting the deference traditionally afforded to pro se plaintiffs, the Court finds that Plaintiff has pleaded sufficient facts to withstand Defendants' Motion to Dismiss Count Eight for denial of medical care and other necessities. However, to the extent that Plaintiff is attempting to bring another § 1983 conspiracy claim in

Count Eight, Plaintiff has again failed to include a description of the membership, formulation, and purpose of the alleged conspiracy. See Scott, 1990 WL 178556, at \*5. Plaintiff has not even alleged facts to show that there was ever an agreement between Defendants Castor, Durante, Coonahan, and Warden Roth. Therefore, Defendants' Motion to Dismiss the conspiracy claim in Count Eight is granted. However, the claim is dismissed without prejudice, and Plaintiff's motion to amend his Complaint to include facts relevant to the conspiracy claim is granted.

#### **IV. CONCLUSION**

For the reasons stated above, Defendants' motion is granted in part and denied in part.

An appropriate Order follows.

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O R D E R

AND NOW, this 26th day of May 2005, upon consideration of Defendants' Motion to Dismiss (Docket No. 12), and Plaintiff's Response thereto and Motion to Amend the Complaint (Docket No. 15), IT IS HEREBY ORDERED that Defendants' Motion is **GRANTED IN PART AND DENIED IN PART** as follows:

- (1) Defendants' Motion to Dismiss Counts One, Two, and Three is **GRANTED;**
- (2) Defendants' Motion to Dismiss Count Seven is **GRANTED.** Count Seven is dismissed without prejudice and Plaintiff's Motion to Amend the Complaint regarding Count Seven is **GRANTED;**
- (3) Defendants' Motion to Dismiss all official capacity claims against Defendants Matthews, Ellis, Damsker, Durante, Castor, Coonahan, and Roth in Counts Four, Five, Six, and Eight is **DENIED;**
- (4) Defendants' Motion to Dismiss all individual capacity claims against Defendants Matthews, Ellis, Damsker,

Durante, Castor, Coonahan, and Roth in Counts Four, Five, Six, and Eight is **DENIED**; and

- (5) Defendants' Motion to Dismiss the conspiracy claim in Count Eight is **GRANTED** and the claim is dismissed without prejudice. Plaintiff's Motion to Amend his Complaint regarding Count Eight is **GRANTED**.

BY THE COURT:

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HERBERT J. HUTTON, S.J.