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

VERNON LEE LAWSON,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 04-1139
v.	:	
	:	
RITE AID OF PENNSYLVANIA, INC., DWAYNE PARKER and YOLANDA LAWRY,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, S. J. July 26, 2006

Presently before the Court are: Defendant, Rite Aid of Pennsylvania Inc.'s, Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(5) and 12(b)(6) (Docket No. 29), Plaintiff's Motion in Opposition to Defendants' Motion to Dismiss (Docket No. 32), Defendant Rite Aid's Reply (Docket No. 36), and Plaintiff's Reply (Docket No. 39); Plaintiff's Motion to Compel Discovery (Docket No. 31) and Defendant Rite Aid's Reply (Docket No. 37); Plaintiff's Motion Granting Sufficient Process of Service Upon all Defendants (Docket No. 40) and Defendant Rite Aid's Response (Docket No. 45); Plaintiff's Motion to Amend [his Amended] Complaint (Docket No. 42) and Defendant Rite Aid's Response (Docket No. 44).[1] For the reasons set forth below, Defendant's Motion to Dismiss Plaintiff's Amended Complaint is granted; Plaintiff's Motion Granting Sufficient

1. Although Docket No. 44 is Defendant's Reply to Plaintiff's Motion to Amend [his Amended] Complaint, it is incorrectly titled "Defendant's Rite Aid of Pennsylvania, Inc. Reply to Plaintiff's Motion Granting Sufficient Process Upon all Defendants."

Process Upon all Defendants is denied; Plaintiff's Motion to Amend [his Amended] Complaint is denied; and, Plaintiff's Motion to Compel Discovery is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appearing *pro se*, Plaintiff is a prisoner at SCI-Pittsburgh.[2] Plaintiff alleges that on October 26, 2002 he was shopping at a Rite Aid store in Philadelphia, Pennsylvania when Defendant Dwayne Parker ("Defendant Parker"), a Rite Aid security guard, detained Plaintiff. After an exchange of words between Plaintiff and Defendant Parker, a physical altercation ensued and Defendant Parker subdued Plaintiff until the police arrived. Plaintiff allegedly suffered various injuries during this incident.

Plaintiff filed this action under 42 U.S.C. § 1983 against Defendant Rite Aid Pharmacy ("Defendant Rite Aid"), Defendant Parker and Defendant Yolanda Lawry ("Defendant Lawry"), Rite Aid store manager, on March 17, 2004 (Docket. No. 1).[3] Plaintiff attempted to effect service of the Complaint on all Defendants by certified mail on June 1, 2005 (Docket Nos. 16-17). Subsequently, Plaintiff filed a Motion to Amend his Complaint (Docket No. 21), which this Court granted (Docket No. 24). Plaintiff amended the caption from Rite Aid Pharmacy to Rite Aid of Pennsylvania, Inc. Plaintiff then attempted to effect service on all Defendants by mailing a copy of the Amended Complaint to defense counsel by first class mail. Defense

2. Plaintiff filed a Motion for Appointment of Counsel (Docket No. 30) on January 6, 2006. In this Court's Order of January 10, 2006 (Docket No. 34), the Court denied Plaintiff's Motion for Appointment of a Counsel without prejudice and the Court invited Plaintiff to renew his Motion provided that he answered the requisite questionnaire and file it as an attachment to a renewed motion. Plaintiff never renewed this motion.

3. The Court presumes that Plaintiff brings his Complaint pursuant to 42 U.S.C. § 1983 because he attached a form used for prisoners filing § 1983 complaints in the Eastern District of Pennsylvania

counsel informed Plaintiff that she was not authorized to accept service on behalf any Defendant and that first class mail was not the proper means to effect service.

By letter dated, November 3, 2005, Plaintiff acknowledged receipt of defense counsel's letter and informed defense counsel that he would effect service. To date, service has not been effected on any Defendant.

II. DISCUSSION

A. Defendant Rite Aid's Motion to Dismiss

Defendant Rite Aid's Motion to Dismiss argues that this Court does not have jurisdiction over Plaintiff's Amended Complaint because of insufficient service of process. Defendant Rite Aid also argues that Plaintiff fails to state a claim under 42 U.S.C. § 1983. Since Defendant Rite Aid's jurisdictional attack is dispositive of all other issues, the Court will first address whether Plaintiff properly effectuated service of process on Defendants.

1. Insufficiency of Service of Process

Federal Rule of Civil Procedure 4(h) controls service of process on corporations, such as Defendant Rite Aid. Rule 4(h) says that service shall be effected:

> [I]n a judicial district of the United States in the manner prescribed for by [Rule 4] subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . .

Rule 4(e)(1) states that "unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed . . . may be effected in any judicial district of the United States: (1) pursuant to the law of the state in which the district court is located . . . ." Under the Pennsylvania Rules of Civil Procedure, original process may be

served by handing a copy "at any office or usual place of business of the defendant to his agent or the person for the time being in charge thereof." Pa. R. Civ. P. 402(a)(2)(iii). Alternatively, a plaintiff can notify the defendants by mail of the commencement of the action and request that they waive personal service. Fed. R. Civ. P. 4(d)(2). Thus, in the absence of a waiver by Defendants, the only way for Plaintiff to effect service is through personal service, either by handing a copy of the Complaint to a person authorized to receive such service or process or by handing a copy of the Complaint to an agent or person in charge at any office or usual place of business of Defendants. Neither certified mail nor first class mail is an acceptable means of service absent a waiver.

Here, Plaintiff attempted to effect service of the original Complaint on Defendants by certified mail on June 1, 2005. Plaintiff attempted to effect service of the Amended Complaint on Defendants by mailing a copy to defense counsel via first class mail. Defense counsel informed Plaintiff that she was not authorized to accept service on behalf of any Defendant and that first class mail was not the proper means to effect service. Plaintiff then attempted to effect service of his Amended Complaint on Defendants by mailing a copy via certified mail to Rite Aid of Pennsylvania, Inc., 1201 West Girard Avenue, Philadelphia, PA, 19123. To date, personal service has not been effected on any Defendants nor have Defendants waived service.[4]

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4. Defense counsel entered her appearance on behalf of Defendant Rite Aid on August 4, 2005. Making a general appearance, however, does not constitute a waiver of personal service so long as the defendant raise the issue of insufficient service in the first responsive pleading or Rule 12 motion. 2 Moore's Federal Practice, §12.33[2] (Matthew Bender 3d ed.); See also Burroughs Corp. v. Carsan Leasing Co., 99 F.R.D. 528 (D.N.J. 1983) (holding that an appearance by a party does not waive that party's right to raise a claim of insufficient service of process). Although Defendant Rite Aid did not raise the issue of insufficient service in its Answer (Docket No. 19), Defendant Rite Aid did raise in their Rule 12 motion. (Def.'s Mot. to Dismiss at 12-13.)

Although *pro se* litigants are generally held to less stringent standards, "a *pro se* plaintiff is not excused from complying with the rules of procedural and substantive law." Hatcher v. Potter, No. 04-2130, 2005 U.S. Dist. LEXIS 31742, at *2 (E.D. Pa. Dec. 7, 2005) (citing Faretta v. California, 422 U.S. 806, 835 n. 46 (1975)). This Court cannot exercise jurisdiction over Defendants that have not been served in accordance with the Federal and Pennsylvania Rules of Civil Procedure.

Before the Court can dismiss Plaintiff's suit for insufficient service of process, however, the Court should "determine whether good cause exists for an extension of time." Petrucelli v. Bohringer & Ratzinger, 46 F.3d 1298, 1305-06 (3d Cir. 1995). Good cause requires "a demonstration of good faith on the part of the party seeking enlargement and some reasonable basis for noncompliance." Id. Plaintiff argues that he is unable to effect personal service on Defendants due to his incarceration.[5] (Pl.'s Reply at 2) (requesting the Court "grant sufficient service of process effected upon all defendants based upon the Plaintiff's imprisonment"). Incarceration does not constitute a reasonable basis for noncompliance. See generally Muhammed v. County of Lehigh Comm'n, No. 02-187, 2003 U.S. Dist. LEXIS 17403 (E.D. Pa. Sep. 29, 2003) (ordering *pro se* plaintiff to comply with the Federal Rules of Civil Procedure regarding to service of his amended complaint on defendants despite his incarceration). Similarly, Plaintiff's ignorance of procedural rules does not constitute a reasonable basis for noncompliance. Conrad v. John E. Potter, Postmaster Gen., No. 04-5094, 2006 U.S. Dis. LEXIS 786, at *6, (D.N.J. Jan. 10, 2006) (citation omitted). This is especially relevant in this case considering that when Plaintiff had knowledge of the defect in his service on Defendants and

5. Plaintiff also filed a Motion Granting Sufficient Process (see Section II (B) below).

acknowledged as much in his response to defense counsel on November 3, 2005. Further, the Court notes that it has already provided Plaintiff with several time extensions to serve both his original and Amended Complaint. (Docket Nos. 14, 24.) Accordingly, the Court dismisses Plaintiff's Amended Complaint for insufficient service of process.

2. Insufficiency of Plaintiff's Claim under 42 U.S.C. § 1983[6]

Alternatively, Defendant Rite Aid argues that Plaintiff's Amended Complaint should also be dismissed under Federal Rule of Civil Procedure 12(b)(6) for Plaintiff's failure to state a claim under 42 U.S.C. § 1983. In considering a Rule 12(b)(6) motion for failure to state a claim upon which relief may be granted, courts must accept as true all factual allegations plead in the complaint and must draw all reasonable inferences in favor of the non-moving party. Bd. of Trustees v. Wettlin Assocs., 237 F.3d 270, 272 (3d Cir. 2001). Courts are not obligated to credit the complaint's "bald assertions" or "legal conclusions." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

To state a claim under § 1983, Plaintiff must show that the alleged deprivation was committed by a person "acting under color of state law."[7] West v. Atkins, 487 U.S. 42, 48

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6. Defendant Rite Aid also argues that Plaintiff's Amended Complaint should be dismissed pursuant to Rule 12(b)(1), lack of subject matter jurisdiction, of the Federal Rules of Civil Procedure. (Def.'s Mot. to Dismiss at 4.) Since the Court is dismissing Plaintiff's Amended Complaint under Rule 12(b)(5), insufficient service of process, and 12(b)(6), failure to state a claim, the Court declines to address this argument.

7. A plaintiff alleging a § 1983 claim must also allege that the defendant violated "a right secured by the Constitution and laws of the United States." West, 487 U.S. at 48. Plaintiff did not include any specific violation of the Constitution or laws of the United States in his original or Amended complaint. Further, the adequacy of this element is not contested by Defendants.

(1988). To establish state action, "the plaintiff must aver the existence of a pre-arranged plan [between the police and a private entity] by which the police substituted the judgment of [a] private party for their own official authority." Cooper v. Bank of Am. Corp., No. 05-4780, 2006 U.S. Dist. LEXIS 23388, at *6 (E.D. Pa. Apr. 26, 2006) (citing Cruz v. Donnelly, 727 F.2d 79, 81 (3d Cir. 1984). Further, "the critical issue . . . is whether the state, through its agents or laws, has established a formal procedure or working relationship that drapes private actors with the power of the state." Cruz, 727 F.2d at 82; compare Lynch v. Donald Safeguard Sec., Inc., No. 00-1331, 2000 U.S. Dist. LEXIS 13248, at *22-24 (E.D. Pa. Sep. 1, 2000) (finding no state action where plaintiff failed to allege a prearranged plan between Shop Rite and the Philadelphia Police Department), with Upchurch v. The Mills Corp. d/b/a Dover Mall, 05-252, 2006 U.S. Dist. LEXIS 37472, at *8 (D. Del. June 8, 2006) (finding state action because plaintiff created an inference of state action in his complaint by alleging "an agreement or arrangement with the City of Dover in the use of the City of Dover's police officers at Dover Mall . . . "). "Merely calling the police, furnishing information to the police or communicating with a state official does not . . . transform a private entity into a state actor." Cooper, 2006 U.S. Dist. LEXIS 23388, at *7 (citations omitted).

Here, Plaintiff alleges that "Plaintiff was wrestled down to the floor while [Defendant] Parker subdued his person until the police arrived." (Am. Compl. at 2.) As noted above, merely calling the police is not sufficient to transform Defendant Rite Aid into a state actor. Plaintiff also fails to allege that a pre-arranged plan existed between Defendants and the Philadelphia Police Department. Despite Plaintiff's argument to the contrary, (Pl.'s Reply ¶ 7; Pl.'s Surreply ¶ 4), even construing the facts in a light most favorable to the Plaintiff, the Court is

unable to draw a reasonable inference that Defendants and the Philadelphia Police Department had a pre-arranged plan. Therefore, the Court finds that Defendants are not state actors for purpose of the § 1983 analysis. Accordingly, the Court also dismisses Plaintiff's Amended Complaint under Rule 12(b)(6) for failure to state a claim.

B. Plaintiff's Motion Granting Sufficient Process

Presumably in response to Defendant Rite Aid's argument of insufficient service of process in its Motion to Dismiss, Plaintiff filed a Motion Granting Sufficient Process. For the reasons set forth in section II (A)(1) above, Plaintiff's Motion Granting Sufficient Process is denied.

C. Plaintiff's Motion to Amend Complaint

Under Federal Rule of Civil Procedure 15(a), "a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[8] "In the absence of any apparent or declared reason, such as . . . futility of amendment . . . the leave sought should, as the rules require, be 'freely given.'"[9] Forman v. Davis, 371 U.S. 176, 226 (1962).

In his Motion to Amend [his Amended] Complaint, Plaintiff requests leave to add the following claims against Defendant Dwayne Parker: violation of the Eighth Amendment of the United States Constitution; assault and battery; violation of the Fourth and Fourteenth

8. Defendants filed their responsive pleading in the form of an answer on August 8, 2005.

9. Additional reasons for a court to refuse to grant leave to amend include: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed and undue prejudice to the opposing party by virtue of allowance of the amendment. Forman, 371 U.S. at 182.

Amendments of the United States Constitution; violation of Section 26 of the Pennsylvania Constitution; violation of Title VII of the Civil Rights Act of 1964; intentional infliction of emotional distress; conspiracy and negligence. Plaintiff requests to add a claim of negligence against both Defendant Lawry and Defendant Rite Aid. Plaintiff also includes a statement requesting recovery of punitive damages.

As noted above, Plaintiff filed his action under 42 U.S.C. § 1983. Therefore, Plaintiff must show that the alleged deprivation of his constitutional or federal rights under the Fourth, Eight and Fourteenth Amendments were committed by a person "acting under color of state law." West, 487 U.S. at 48.

Plaintiff cannot properly plead violations under the Fourth and Fourteenth Amendments. Plaintiff's proposed amendment states, "the action of [Defendant] Parker in using racial profiling on the Plaintiff . . . constituted discrimination" under the Fourth and Fourteenth Amendments. (Pl.'s Proposed Compl. at 2.) The Fourth Amendment, as applied to the states via the Fourteenth Amendment, protects against unreasonable searches and seizures only when conducted by state actors. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 613 (1989). As established in section II (A)(2) above, the Court finds that Plaintiff fails to allege any facts in his proposed Second Amended Complaint to support a finding that Defendants are state actors. Therefore, Plaintiff's proposed amendment regarding violations of the Fourth and Fourteenth Amendments are futile.

Similarly, Plaintiff cannot properly plead a violation of the Eighth Amendment. Plaintiff's proposed amendment states "the action of [Defendant] Parking in using physical force against Plaintiff . . . constituted deliberate indifference and cruel and unusual punishment." (Pl.'s

Proposed Am. Compl. at 1.) The Eighth Amendment prohibits infliction of cruel and unusual punishment in the context of penal measures and prison conditions. See Estelle v. Gamble, 429 U.S. 97, 102 (1976). To state a claim for a violation of the Eighth Amendment, a plaintiff must allege that he was deprived of "the minimal civilized measure of life's necessities," such as adequate food, clothing, shelter, sanitation, medical care and personal safety" while imprisoned, Rhodes v. Chapman, 452 U.S. 337, 347-348 (1981), and that the state actors knew of such substandard conditions or treatment and "acted or failed to act with deliberate indifference to a substantial risk of harm to inmate health or safety." Ingalls v. Florio, 968 F. Supp. 193, 198 (D.N.J. 1997). Plaintiff's claim of "cruel and unusual punishment" arises from the alleged incident on October 26, 2002 at a Rite Aid in Philadelphia, PA, not during Plaintiff's imprisonment. Also, as established in section II (A)(2) above, the Court finds that Plaintiff fails to allege any facts in his proposed Second Amended Complaint to support a finding that Defendants are state actors. Therefore, Plaintiff's proposed amendment regarding a violation under the Eighth Amendment is futile.

Finally, Plaintiff proposes the addition of a claim for race discrimination in violation of Title VII of the Civil Rights Act of 1964. (Pl.'s Proposed Am. Compl. at 3.) Title VII pertains to discrimination in the workplace and applies principally to employers. 42 U.S.C. § 2000e *et seq*. There are no allegations in the proposed Second Amended Complaint that Defendant Rite Aid was Plaintiff's workplace or that Defendants were Plaintiff's employers. To the extent that Plaintiff's claims of race discrimination fall under 42 U.S.C. § 1983, again, Plaintiff fails to allege any facts in his proposed Second Amended Complaint to support a finding

that Defendants are state actors. Therefore, Plaintiff's proposed amendment of race discrimination, under Title VII or § 1983, is also futile.

Since the Court finds that the proposed claims based on federal jurisdiction are futile, without entertaining the validity of Plaintiff's state law claims of assault and battery, violation of Section 26 of Pennsylvania's Constitution, intentional infliction of emotional distress, conspiracy and negligence, the Court declines to exercise supplemental jurisdiction over these claims. See Markowitz v. Northeast Land Co., 906 F.2d 100, 106 (3d Cir. 1990).

D. Plaintiff's Motion to Compel Discovery

Since the Court is granting Defendant's Motion to Dismiss Plaintiff's Amended Complaint and denying Plaintiff's Motion to Amend [his Amended] Complaint, Plaintiff's Motion to Compel Discovery is denied as moot.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's Amended Complaint is granted; Plaintiff's Motion Granting Sufficient Process is denied; Plaintiff's Motion to Amend [his Amended] Complaint is denied; and, Plaintiff's Motion to Compel Discovery is denied. An appropriate order follows.

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

VERNON LEE LAWSON,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 04-1139
v.	:	
	:	
RITE AID OF PENNSYLVANIA, INC., DWAYNE PARKER and YOLANDA LAWRY,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 26th of July, 2006, upon consideration of Defendant, Rite Aid of Pennsylvania, Inc.'s, Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(5) and 12(b)(6) (Docket No. 29), Plaintiff's Motion in Opposition to Defendants' Motion to Dismiss (Docket No. 32), Defendant Rite Aid's Reply (Docket No. 36) and Plaintiff's Reply (Docket No. 39); Plaintiff's Motion to Compel Discovery (Docket No. 31) and Defendant Rite Aid's Reply (Docket No. 37); Plaintiff's Motion Granting Sufficient Process of Service Upon all Defendants (Docket No. 40) and Defendant Rite Aid's Response (Docket No. 45); and Plaintiff's Motion to Amend [his Amended] Complaint (Docket No. 42) and Defendant's Rite Aid's Response (Docket No. 44),[10] it is hereby **ORDERED** that Defendant's Motion to Dismiss is**GRANTED** ; Plaintiff's Motion Granting Sufficient Process

10. Although Docket No. 44 is Defendant's Reply to Plaintiff's Motion to Amend [his Amended] Complaint, it is incorrectly titled "Defendant's Rite Aid of Pennsylvania, Inc.'s Reply to Plaintiff's Motion Granting Sufficient Process Upon all Defendants."

Upon all Defendants is **DENIED**; Plaintiff's Motion to Amend [his Amended] Complaint is **DENIED**; and, Plaintiff's Motion to Compel Discovery is **DENIED**.

This case is **CLOSED.**

BY THE COURT:

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RONALD L. BUCKWALTER, S.J.