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

DAMAAR DABNEY	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-CV-1353**
	:	
CITY OF PHILADELPHIA, et al.	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **January 16 , 2007**

Plaintiff Damaar Dabney ("Plaintiff") brings this action for violations of 42 U.S.C. § 1983 ("§ 1983") against Defendants City of Philadelphia and Shanti Lewis ("Defendants"). Now before the Court is Defendants' uncontested Motion for Summary Judgment. For the reasons that follow, the Motion will be granted.

I. BACKGROUND

The following facts are uncontested by Plaintiff. At all times relevant to this action, Plaintiff was an inmate at the Curan Fromhold Correctional Facility. On September 12, 2002 at approximately 6:30 PM, an altercation took place between Plaintiff and one of the Correction Officers on duty, Defendant Shanti Lewis ("Officer Lewis"). See Compl. ¶ V; Defendants' Statement of Uncontested Material Facts ("Defs.' Statement") at ¶ 1. During the course of that altercation, Officer Lewis struck Plaintiff on the right side of his face with an ink pen. See Compl. ¶ V; Defs.' Statement at ¶¶ 1, 2.

Defendants contend that Officer Lewis acted in self-defense. According to Defendants, the altercation began when Plaintiff emerged from a cell, swinging an electrical switch plate toward Officer Lewis. See Defs.' Statement at ¶ 2. Officer Lewis responded by attempting to push Plaintiff back into the cell and closing the door. See id. In the course of forcing the cell door closed, Officer Lewis scratched Plaintiff with the pen she had been holding in her hand.

See id.; see also Investigation Report attached as Exhibit C to Defendant's Motion for Summary Judgment ("Defs.' Motion") at 2.

Pursuant to Philadelphia Prison policy, the September 12 incident was reported to the Philadelphia Police. On November 13, 2002, the Philadelphia District Attorney's Office filed a criminal complaint against Plaintiff charging him with aggravated assault, possession of an instrument of crime, terroristic threats, recklessly endangering another person, and simple assault. See Criminal Complaint attached as Exhibit D to Defs.' Motion. Following a December 15, 2004 criminal trial, a jury returned verdicts of "Not Guilty" on the charges of aggravated assault, possession of an instrument of crime, terroristic threats, and recklessly endangering another person, but a verdict of "Guilty" on the simple assault charge. See Certified Copy of Trial Court Criminal Record attached as Exhibit E to Defs.' Motion. Plaintiff was sentenced to two years of probation. See id. Plaintiff did not appeal or challenge the conviction. See Defs.' Motion. at 2.

The September 12 incident was also the subject of prison disciplinary proceedings against Plaintiff for inmate misconduct. See Defs.' Statement at ¶ 7 (citing Lock&Track Misconduct Disposition Report attached as Exhibit F to Defs.' Motion). Plaintiff was found guilty of: (1) tampering/damaging security equipment, (2) disrespecting a staff person, and (3) disturbing other inmates. See id. Plaintiff was given seven days punitive segregation and credited with time served. See id.

Plaintiff filed this action pursuant to 42 U.S.C. §1983 on March 29, 2004. Defendants first moved for Summary Judgment on February 13, 2006. Plaintiff did not file a response to that

Motion.[1] Defendants refiled their Motion for Summary Judgment on September 26, 2006. Plaintiff again failed to file a response.

II. LEGAL STANDARD

When a party fails to respond to a properly filed motion, the Court may treat the motion as uncontested. E.D. Pa. Local R. Civ. P. 7.1(c). Unlike other motions, the Court may not grant an uncontested summary judgment motion without an independent determination that the movant is entitled to judgment under Fed. R. Civ. P. 56. Id. By failing to respond, however, "the nonmoving party waives the right to respond to or to controvert the facts asserted in the summary judgment motion." Reynolds v. Rick's Mushroom Serv., 246 F. Supp. 2d 449, 453 (E.D. Pa. 2003) (quoted in Vaira, E.D. Pa. Federal Practice Rules, Comment on Rule 7.1 (Gann)).

In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the test is "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party's favor.

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[1] This case was originally before the Honorable Hebert J. Hutton. On April 12, 2006, after Defendants had filed their motion for summary judgment, the case was transferred to this Court's docket. At the time, Plaintiff had not timely responded to Defendants' motion. The Court denied the motion without prejudice to refile because it did not include a "short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried." See Chambers Policies and Procedures, Bruce W. Kauffman J. at 5.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, "there can be 'no genuine issue as to any material fact' . . . [where the non-moving party's] complete failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment bears the initial burden of showing the basis for its motion. See Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). If the movant meets that burden, the onus then "shifts to the non-moving party to set forth specific facts showing the existence of [a genuine issue of material fact] for trial." Id.

III. ANALYSIS

In order to make a prima facie case under § 1983, a plaintiff must show that a person acting under color of law deprived him of a federal right.[2] Berg v. County of Allegheny, 219 F.3d 261, 268 (3d Cir. 2000). While Plaintiff's complaint does not specify which of his federal rights he believes were violated, his theory appears to be that Officer Lewis' scratching him on the face with her pen constituted cruel and unusual punishment in violation of the Eighth Amendment. The standard for such claims is now well-established: "Whenever prison officials stand accused of using excessive force in violation of the Cruel and Unusual Punishment Clause, the core judicial inquiry is ... whether force was applied in a good-faith effort to maintain or

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[2] 42 U.S.C. § 1983 states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.

restore discipline or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6 (1992).

Here, Plaintiff has failed to establish that there is any genuine issue of fact as to whether Officer Lewis used excessive force. The investigation report that Defendants submitted as an exhibit to their Motion provides support for their account of the incident – namely, that Officer Lewis acted in self-defense and did not use any more force than was necessary to ensure her own safety. See Investigation Report attached as Exhibit C to Defendant's Motion at 1, 2, 5. Moreover, Plaintiff was convicted in a criminal action of assaulting Officer Lewis in connection with the incident, a conviction which Plaintiff did not appeal or challenge.[3] Based on these uncontested facts, the Court cannot conclude that a reasonable jury could find that Officer Lewis engaged in the sort of "sadistic" or "malicious" conduct necessary to make out an Eighth Amendment violation. Hudson, 503 U.S. at 6.

The evidence Defendants have presented effectively precludes Plaintiff from establishing an essential element of his Eighth Amendment claim. The burden shifts to Plaintiff to set forth

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[3] Under Pennsylvania law, simple assault is defined as:

> (a) OFFENSE DEFINED – A person is guilty of assault if he:
> (1) attempts to cause or intentionally, knowingly, or recklessly causes bodily injury to another;
> (2) negligently causes bodily injury to another with a deadly weapon;
> (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
> (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.

18 Pa. Const. Stat. § 2701.

evidence creating a genuine issue of material fact as to whether Officer Lewis employed excessive force. Shields, 254 F.3d at 481. As Plaintiff has failed to respond to Defendants' Motion, he has not met that burden. Accordingly, Plaintiff's claim against Officer Lewis must fail.[4]

Similarly, Plaintiff's claim against the City of Philadelphia (the "City") must fail. Liability arising from § 1983 violations cannot be imposed on the City under the doctrine of *respondeat superior*. Monell v. Dept. of Social Serv. of City of N.Y., 436 U.S. 658, 691 (1978). Rather, liability can be imposed on the City only if Plaintiff's alleged injury was inflicted as part of a government policy or custom. See Oaks v. City of Philadelphia, 59 Fed. Appx. 502, 503 (3d Cir. 2003). A government policy is made when a decision-maker holding final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict. Pembaur v. City of Cincinnati, 475 U.S. 469, 481(1986) (cited in Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (internal quotations omitted)). Alternatively, a

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[4] Even if Plaintiff had submitted a response contesting Defendants' factual allegations, it is questionable whether his claims would be cognizable under §1983. The United States Supreme Court held in Heck v. Humphrey, 512 U.S. 477 (1994), that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus ... A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." Id. at 486-87 (emphasis in original). Accordingly, when a prisoner seeks damages under § 1983, this Court must "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id. at 487. Based on the allegations in Plaintiff's complaint, it appears that Plaintiff is, in fact, making claims that would undermine his simple assault conviction, a conviction which has not been invalidated.

course of conduct may be considered a custom when "practices of state officials are so permanent and well settled as to virtually constitute law." Andrews, 895 F.2d at 1480 (citing Monell, 436 U.S. at 690 (citations omitted)). Moreover, a plaintiff must show that the policy or custom amounts to "deliberate indifference" to his or her rights. Carswell v. Borough of Homestead, 381 F.3d 235, 244 (3d Cir. 2004) (quoted in Glass v. City of Philadelphia, 2006 WL 2873992, at *26 (E.D. Pa. Oct. 10, 2006)).

Plaintiff has not alleged any government policy or custom on the part of the City which contributed to his alleged injuries. Moreover, Plaintiff has not identified any "deliberate indifference" to his rights. In fact, Plaintiff's complaint does not make a single allegation against the City. Accordingly, summary judgment will also be granted in favor of the City.

III. CONCLUSION

There is no evidence in the record upon which a reasonable jury could conclude that Officer Lewis employed excessive force when she scratched Plaintiff's face, or that the City had a policy or custom that contributed to Plaintiff's alleged injuries. Accordingly, the Defendants are entitled to Summary Judgment. An appropriate Order follows.

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ORDER

AND NOW, this 16th day of January, 2007, upon consideration of Defendants' uncontested Motion for Summary Judgment (docket no. 24), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED.** It is **FURTHER ORDERED** that the Clerk shall enter Judgment for Defendants and mark this case **CLOSED**.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.